No. 957.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CLARA E. SACKETT,
Plaintiff in Error,

vs.

MARY McCAFFREY and JOSEPH McCAFFREY,
Defendants in Error.

BRIEF AND ARGUMENT FOR THE APPELLANT CLARA E. SACKETT

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STATEMENT OF THE CASE.

This is an action in ejectment to recover Lot 11 in Block 89 in the City of Anaconda, Montana. The complaint alleges that the plaintiff is a resident and citizen of the State of New York, and that the defendants are residents and citizens of Deer Lodge County, Montana; that the matter in dispute in the action, exclusive of interest and costs, exceeds the sum of $2,000.00; that on the 28th day of May, 1902, plaintiff was and ever since has been and now is the owner and entitled to the possession of said premises, but that the same is unlawfully withheld from her by the defendants.

The answer admits the allegations of the complaint as to the respective residence and citizenship of plaintiff and defendants; denies the ownership of plaintiff in said premises and the wrongful withholding by defendants, and alleges that defendants have at all times mentioned in the complaint been in the lawful possession of said premises. The answer further alleges that on November 24th, 1900, the defendants were and now are husband and wife, and that at all of said times defendant Mary McCaffery resided and now resides, with her said husband in and upon said premises, and that during said times defendants owned the same in fee simple and that the same constituted defendant's homestead. Said answer further alleges:

"3. That on the 24th day of November, A. D. 1900, the said defendant, Mary McCaffery, (her husband, the said defendant, Joseph McCaffery, not having made such selection), executed and acknowledged in the same manner as a grant of real property is acknowledged, a declaration of homestead upon and for the above-described land, and the dwelling-house thereon and its appurtenances.

"4. That said declaration of homestead so made and executed as aforesaid contained a statement that her husband had not made such declaration of homestead, and that she, the said Mary McCaffery, therefore made such declaration of homestead for the joint benefit of herself and her said husband, Joseph McCaffery, and a statement that she, the said Mary McCaffery, the person making such declaration of homestead, was residing upon said premises and claimed them as a homestead, and said declaration of homestead contained a description of the above-described premises so claimed as a homestead as aforesaid,

and also an estimate of the actual cash value of said premises."

Said answer further alleges that said homestead declaration was filed for record n the office of the Clerk of the County of Deer Lodge on November 26th, 1900, and that the land so claimed as a homestead did not exceed one-fourth of an acre in quantity or $2,500.00 in value.

By her reply, the plaintiff puts in issue defendant's ownership of said premises after May 12th, 1900, and their homestead character, the execution, acknowledgement and recording of said homestead declaration as alleged in the answer, but admits that on the 24th day of November, 1900, the defendant, Mary McCaffery, executed and acknowledged an instrument purporting to be a declaration of homestead on the premises in controversy, in words and figures as follows, to-wit:

"Know all men by these presents: That I do hereby certify that I am the wife of Joseph McCaffery, and that I do now, at the time of making this declaration, actually reside with my family on the land and premises hereinafter described.

"That the land and premises on which I reside are bounded and described as follows, to-wit: Lot number (11) in Block number (89), in the City of Anaconda, Deer Lodge County, Montana. That it is my intention to use and claim the said lot of land and premises above described, together with the dwelling-house thereon, and its appurtenances, as a homestead.

"And I do hereby select and claim the same as a homestead. That I make this declaration for the joint benefit of myself and husband, and I declare that my husband has

not made a declaration of homestead. That the actual cash value of said property I estimate to be

"In witness whereof I have hereunto set my hand and seal this 24th day of November, A. D. 1900.

"Witness to mark: J. T. Casey.

HER

"MARY X McCAFFERY (SEAL.)

MARK

"STATE OF MONTANA,
"COUNTY OF DEER LODGE. } SS.

"On this 24th day of November, A. D. 1900, before me, John T. Casey, a Notary Public, in and for the County and State aforesaid, personally appeared Mary McCaffery, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

"In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year first above written.

"(NOTARIAL SEAL) JOHN T. CASEY,

"Notary Public in and for Deer Lodge County, Montana."

The plaintiff admits that on the 26th day of November, 1900, defendant Mary McCaffery filed this instrument and had the same recorded in the office of the said County Clerk, and that this is the identical instrument described in the answer as a declaration of homestead, but that the same is not a declaration of homestead for the reason that it contained no estimate of the value of said premises, and was at the time of such filing and at all subsequent times void.

Said reply further alleges, "That at the time of the filing of the alleged declaration of homestead, and long prior thereto, and ever since the time of said filing, the said Mary McCaffery and her husband, or either of them, did not reside on that part of said lot," which the reply proceeds to describe by metes and bounds, (Tr. 16, l. 9 ff.), "but that the same was occupied by and rented to tenants of defendant Mary McCaffery; and that the same was not, and could not have been, a homestead, or any part of a homestead of said defendant, Mary McCaffery, and her husband or either of them. That said tenant premises, at the time of the filing of said alleged declaration, and long prior thereto, and ever since said filing, have been entirely separate and distinct from the premises used by defendants, or either of them as a home," etc. (Tr. p. 16 f.)

To prove her title to the premises in controversy, plaintiff introduced in evidence exemplified copies of the judgment roll, order of sale, and judgment docket showing a deficiency judgment in the case of Mrs. M. A. Sackett vs. Mary McCaffery and Joseph McCaffery. This case had been brought in the District Court of the Third Judicial District of Montana in and for said County of Deer Lodge to foreclose a mortgage upon other property belonging to defendants. After the sale of said mortgaged property, judgment for a deficiency of $1,119.68 was docketed against said defendants.

Plaintiff also introduced in evidence an exemplified copy of an execution on said deficiency, the Sheriff's return on which showed the sale of the premises in controversy

in this action in two tracts, the first being described by metes and bounds, and being the tract described by metes and bounds in the reply as tenant property (Tr. 16, l. 9 ff.), and shown on the map of the premises (Tr. 36) as the portion of Lot 11 lying to the south and right on said map, with a brick house thereon, and including the ground directly in front of said house, and the yard in the rear thereof (enclosed by fence), said back yard extending back to and including the portion of the double woodshed on the rear end of said back yard as indicated on the map, together with other outbuildings; and the other tract being described generally as all the rest and residue of said Lot 11 not included in the portion of said lot last above described.

Plaintiff also introduced in evidence exemplified copies of the Sheriff's certificate of sale and deed issued in pursuance of said sale under execution; also of the deed of Mrs. M. A. Sackett, widow, of Westfield, N. Y., conveying all of said Lot 11 to Clara E. Sackett, her daughter, residing at Buffalo, N. Y.

It was proved and uncontradicted that the property exceeded in value $2,000.

As part of their defense, the defendants offered in evidence (Tr. 26, l. 26) an alleged declaration of homestead, it being in all respects the same as the instrument set forth in the plaintiff's reply, except that there was inserted the figures "$2,000.00" after the words "I estimate to be." (Tr. 14, line 16; Cf. p. 27, line 19.) Said instrument contained the endorsement of the County Recorder of Deer

Lodge County, showing that the same had been filed for record on November 26th, 1900.

To the introduction of this instrument, counsel for plaintiff objected (Tr. 28, line 23) on the grounds (1) that the instrument was not stamped, as required by the laws of the United States in force at the date of its execution, (2) that the notarial certificate of acknowledgment was not stamped as required by said laws, and (3) that the recording of the same in its unstamped condition was in violation of said laws, and the record thereof was void and of no effect as againt the rights of the plaintiff. But the Court overruled said objection and permitted said instrument to be introduced in evidence.

In rebuttal, the plaintiff offered in evidence an exemplified copy of the records of the land office at Missoula, Montana, showing that on July 15th, 1896, the defendant Joseph McCaffery made homestead entry of a quarter section of government land in Montana, on which a final certificate was issued to him on December 16th, 1901, and patent, October 11th, 1902. This offer was refused by the Court unless plaintiff should follow up said evidence with proof that defendant Joseph McCaffery had at some time actually resided upon said homestead tract, which counsel for plaintiff declared themselves unable to do. Thereupon said evidence was excluded. (Tr. 29.)

Plaintiff introduced evidence tending to show that the portion of the premises in controversy hereinabove referred to as tenant property, and being the brick house and premises to the right on the map of said Lot 11 (Tr. 36), had always been let to tenants and wholly occupied by them,

that at the rear of the tenant house the two portions of the lot had been separated by a fence, and (Tr. 35, line 10) that the said map (Tr. 36) correctly shows the condition of said lot and its improvements on March 16th, 1901. Plaintiff also showed by the testimony of one David Boyd (Tr. 32, line 6) that he had rented the said premises in 1898; that the frame addition or lean-to next to the kitchen had been used by his children as a play-room and by his wife as a storeroom; that there was a fence between the premises occupied by said witness and the north part of the lot, running from the house occupied by him to the woodshed. J. T. Dulin (Tr. 33), who looked at the building in June, 1900, with a view to renting it, found it entirely vacant, and that there was nothing in the frame addition next to the kitchen "except perhaps some old rags or something of that kind lying on the floor." He also testified to a fence dividing the rear portion of the lot. One J. H. Collins, who occupied the building at a later period, to-wit, in May, 1901, testified (Tr. 30, line 36) that he rented the premises described in the reply with the exception of the frame lean-to to the kitchen, and that defendant Joseph McCaffery told witness that "he reserved said frame lean-to or addition because he wanted to sleep there on account of holding possession." Witness testified that he did not know whether anyone slept in the frame addition while he was there. He saw a folding bed in it, but did not notice anything else. There was an uncurtained window from his pantry looking into the frame addition. He saw Mr. McCaffery there two or three times, but only in the day time.

The defendants sought to meet this testimony by evidence tending to show a much more extensive use of the frame addition as a sleeping apartment by Joseph McCaffery. But upon the supposition of the correctness of her own testimony, the plaintiff asked the Court to give the following instructions (Tr. pp. 38-40):

"Instruction No. 2: Section 1670 of the Civil Code of Montana provides:

" 'The homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated, selected as in this title provided.

"Under the provisions of this section, the claimant cannot hold two dwelling houses, one of which he occupies as a residence and the other he lets to tenants. It is the principal use which is made of a house which determines whether it is to be regarded as the residence of the claimant or not. Thus, if the principal use of a house is as the permanent home of the claimant's family, it does not destroy its character as a homestead if one or more rooms are used as a shop in which the claimant carries on his trade or business. In the same manner, if the principal use of a house is as a tenement building, it does not make it the homestead or part of the homestead because some member of the claimant's family may occasionally use one of its rooms as a sleeping apartment.

"The above section 1670 also requires that the homestead must be selected in the manner required by law. The requirements of the law are defined to you in these instructions."

"Instruction No. 6: A homestead cannot include two

dwelling-houses, one of whch is occupied by the claimant and the other let to tenants.

"You are instructed that if you find from the evidence that at the time of filing the homestead declaration in question there were two dwelling-houses upon the premises in controversy, the principal use of one of which was as a residence for defendants and the principal use of the other was as a tenement, then the latter house with the land appurtenant thereto was not properly included in the alleged homestead declaration. Whatever the effect of said declaration as to the building in which the defendants lived, the tenement building, if you find it to have been such as herein defined, remained subject to the lien of plaintiff's deficiency judgment, and in that event plaintiff is entitled to recover such tenement building with its appurtenant land regardless of the question as to whether said alleged homestead declaration was valid or not."

The Court refused both of these instructions.

The jury found generally for the defendants. Upon this verdict the Court entered judgment in favor of the defendants and against the plaintiff for costs of the action. The cause is brought to this Court on Writ of Error.

SPECIFICATION OF ERRORS RELIED ON.

1. The Court erred in admitting in evidence the alleged homestead declaration of defendant Mary McCaffery (Tr. p. 27 f.) for the reasons (1) that said instrument was in all essential respects "a certificate required by law" and the same was required to be stamped according to the pro-

visions of Act of Congress of June 13th, 1898, entitled "An Act to provide Ways and eMans to Meet War Expenditure and for other purposes," and in its unstamped condition said instrument was not entitled to be recorded or to be admitted in evidence; (2) the notarial certificate of acknowledgment attached to said instrument was a certificate required by law and was required to be stamped by the provisions of the said Act of Congress, and being unstamped, the instrument to which it was attached was not entitled to record or to admission in evidence, and (3) the filing for record of said instrument in its unstamped condition was in violation of said laws, and the record thereof was void and of no effect as against the rights of the plaintiff.

2. The Court erred in refusing to permit plaintiff to introduce in evidence the exemplified copy of the records of the United States land office at Missoula, Montana, showing that on July 15th, 1896, defendant Joseph McCaffery made a homestead entry of the S. ½ NE. ¼, SE. ¼ NW. ¼, and the NW. ¼ SW. ¼ of Sec. 31, T. 1 S., R. 15 W., Montana Base and Principal Meridian, and that on December 16th, 1901, final certificate No. 999 was issued to said Joseph McCaffery for said tract, and that on October 11th, 1902, a United States patent was issued to said Joseph McCaffery for said tract, unless plaintiff should follow up said evidence with proof that the said Joseph McCaffery had at some time actually resided upon said tract (Tr. p. 29), for the reasons (1) that said evidence showed that at the date of the filing of the declaration of homestead by Mrs. McCaffery, to-wit, November 26th, 1900, Joseph Mc-

Caffery, her husband, had a valid and subsisting unpatented (government) homestead, which was, in the contemplation of the Federal law, his homestead, and therefore neither he nor his wife could acquire an additional homestead under the state law; (2) that said evidence showed that her said husband at the time she made such declaration was himself precluded from making such a declaration because he was at said time engaged in acquiring title to a homestead under the laws of the United States, and she could not, therefore, make such a declaration for their "joint benefit;" (3) that said evidence showed that her husband had initiated his homestead right in government lands by what was in effect a declaration of homestead; and she therefore could not, under the law, make a declaration of homestead; (4) that said evidence showed that her husband had "selected" a (government) homestead, which, under the law, precluded her from selecting a state homestead; (5) that said evidence tended to impair the good faith of the claim of Mary McCaffery to a homestead in her Anaconda property; (6) that the fact of the residence or non-residence of said Joseph McCaffery upon the tract entered by him as a homestead was one peculiarly within the knowledge of the defendants, and plaintiff should not have been required to show affirmatively his residence upon said tract before being permitted to introduce proof of the entry and patenting of such homestead.

3. The Court erred in refusing to give to the jury the following instruction requested by the plaintiff:

"Instruction No. 2: Section 1670 of the Civil Code provides:

" 'The homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated, selected as in this title provided.'

"Under the provisions of this section, the claimant cannot hold two dwelling-houses, one of which he occupies as a residence and the other he lets to tenants. It is the principal use which is made of a house which determines whether it is to be regarded as the residence of the claimant or not. Thus, if the principal use of a house is as the permanent home of the claimant's family, it does not destroy its character as a homestead if one or more rooms are used as a shop in which the claimant carries on his trade or business. In the same manner, if the principal use of a house is as a tenement building, it does not make it the homestead or part of the homestead because some member of the claimant's family may occasionally use one of its rooms as a sleeping apartment.

"The above section 1670 also requires that the homestead must be selected in the manner required by law. The requirements of the law are defined to you in these instructions."

4. The Court erred in refusing to give the following instruction requested by the plaintiff:

"Instruction No. 6: A homestead cannot include two dwelling-houses, one of which is occupied by the claimant and the other let to tenants.

"You are instructed that if you find from the evidence that at the time of filing the homestead declaration in

question, there were two dwelling-houses upon the premises in controversy, the principal use of one of which was as a residence for defendants, and the principal use of the other was as a tenement, then the latter house with the land appurtenant thereto was not properly included in the alleged homestead declaration. Whatever the effect of said declaration as to the building in which the defendants lived, the tenement building, if you find it to have been such as herein defined, remained subject to the lien of plaintiff's deficiency judgment, and in that event plaintiff is entitled to recover such tenement building with its appurtenant land, regardless of the question as to whether said alleged homestead declaration was valid or not."

ARGUMENT.

I.

THE STAMP QUESTION.

(Tr. p. 28, l. 22, et seq.)

The most important question involved in this appeal is the extent to which the validity of the alleged homestead declaration of Mary McCaffery is affected by its failure to bear the revenue stamp required by the laws of the United States that were in effect at the date of the execution of said instrument.

Schedule A of the Revenue Law of June 13th, 1898, provides that a "certificate of any description required by law not otherwise specified in this Act" shall bear a revenue stamp of ten cents. It might fairly be contended that the

homestead declaration itself is a "certificate required by law." The fact that it is termed a homestead declaration instead of a homestead certificate does not affect its essential character as a certificate nor preclude a court from pronouncing it to be a certificate required by law within the meaning of said act. This, however, is not an important question since the certificate of acknowledgment attached to said declaration is also unstamped, and this is not only expressly required by the laws of Montana, but is also expressly termed a certificate by said laws.

Sec. 1700 of the Civil Code of the State of Montana provides:

"In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record."

The same Code has the following provisions relating to the method of acknowledging a grant of real property:

"Sec. 1573. Before an instrument can be recorded, * * * * its execution must be acknowledged by the person executing it.

"Sec. 1608. An officer taking the acknowledgment of an instrument must endorse thereon, or attach thereto, a certificate substantially in the forms hereinafter prescribed.

"Sec. 1609. The certificate of acknowledgement * * * * must be substantially in the following form: * *

* * * (Then follows the form of notarial certificate used in the instrument in question.)

No clearer instance could be cited of a "certificate required by law" than this, and it has been the ruling of the Treasury Department that such a certificate requires a ten-cent stamp. The only exceptions to this ruling are those cases where the stamping of the main instrument is specifically provided for in said act, and that in such cases the department holds that the law did not contemplate that both the main instrument and the certificate attached thereto should be stamped.

"The notary's certificate of acknowledgment on bills of sale is subject to a tax of ten cents if such a certificate is required by law to make the instrument valid. The notary's certificate to a mortgage is part of an instrument upon which a rate of taxation is imposed and is covered therein. It is not subject to a tax for itself when appended to an instrument for which a rate of taxation is provided."

Ruling No. 20,387, Vol. 1, p. 84, Dec. Com. Int. Rev.

"A notarial certificate of acknowledgment to a satisfaction of mortgage requires a ten-cent stamp."

Second Revision of Circular No. 503, Ruling 53. Vol. 2 p. 290, Dec. Com. Int. Rev.

It is plain that under these rulings a certificate of acknowledgment to a homestead declaration would require a stamp since it is (a) a certificate required by law and (b) it is not appended to an instrument for which a rate of taxation is otherwise provided.

ALTHOUGH THE PROVISION OF LAW IMPOSING SUCH TAX IS REPEALED, THE TAX IS STILL DUE AND PAYABLE TO THE GOVERNMENT.

Said provision of Schedule A was omitted from the Act of March 2d, 1901 (taking effect July 1st, 1901), amending the War Revenue Act. And by the Act approved April 12th, 1902 (taking effect July 1st, 1902), being "An Act to repeal War Revenue taxation and for other purposes," Schedule A was entirely repealed, although other portions of the War Revenue Act were retained.

But the repeal of the provision requiring the tax was not a remission of the tax as to unstamped instruments already executed. Where a tax has become due, the repeal of the law imposing it is not a remission of the tax unless such intention clearly appears.

The general rule of law is stated in State vs. Sloss (Ala.), 3 Southern, 745, as follows:

"Where taxes are levied under a law that is repealed by a subsequent act, unless it clearly appears that the Legislature intended the repeal to work retrospectively, it will be assumed that it intended the taxes to be collected according to the law in force when they were levied."

To the same effect are:

Cyc. of Law, 1st ed. vol. 25, pp. 129-193.

Harrington vs. Galveston County, 1 Tex. App. 437-438.

Smith vs. Humphrey, 20 Mich. 398.

Appeal Tax Court of Baltimore City vs. R. R., 50 Md. 275.

State of Maine vs. Waterville Savings Bank, 68 Me. 515.

State ex rel. Marion Co. vs. Certain Lands, 40 Ark. 35-38.

State ex rel. City Water Co. vs. City of Kearney et al. (Nebraska), 70 N. W. 255.

The City of Oakland vs. Whipple and Chambers, 44 Cal. 303.

United States vs. Dutcher, 2 Biss. 51 (Fed. Cas. 15014).

Town of Belvidere vs. The Warren R. R. Co., 34 N. J. L. 193.

That Congress "intended the tax to be collected according to the law in force when it was levied," appears affirmatively from the retention by Congress of the exclusive governmental machinery for the collection of such taxes.

The act of April 12th, 1902, repealed the following sections of the War Revenue Act relating to documentary stamp taxes:

Sec. 6. (As amended by Sec. 5. of the Act of 1901), imposing stamp taxes on documents enumerated in Schedule A.

Sec. 12. Providing additional facilities for the distribution and sale of adhesive stamps.

Sec. 18. Requiring stamps on telegraphic messages with penalty for violation.

Schedule A. (As amended by Sec. 8 of the law of 1901), specifying what amounts of stamps must be affixed to the documents enumerated therein respectively.

Sec. 25. Providing for the manufacture, distribution and sale of all the stamps provided for in the Act.

Sec. 28. Requiring stamps on parlor and sleeping car tickets.

And the following provisions relating to documentary stamps were left unrepealed:

Sec. 7. Declaring failure to affix documentary stamps a misdemeanor, and excluding unstamped instruments from evidence.

Sec. 8. Imposing penalties for fraudulently stamping documents or for removing stamps from documents or forging or mutilating any stamps, etc., provided for in the Act.

Sec. 9. (As amended by Sec. 6 of the Act of 1901), requiring cancellation of stamps, and imposing penalty for failure to cancel.

Sec. 10. Imposing penalty for issuing or receiving unstamped paper, with fraudulent intent.

Sec. 11. Requiring an acceptor of a bill of exchange, drawn abroad and payable in the United States, to stamp the same, and imposing penalty for failure.

Sec. 13. Imposing penalty for issuing documents unstamped, with intent to defraud; and providing for the post-stamping by the Collector, of instruments which, innocently or otherwise, had been executed unstamped.

Sec. 14. Prohibiting the recording or admission in evidence of unstamped documents and providing that the record thereof shall not be admitted in evidence.

Sec. 16. Making any legal documentary stamp, of the proper amount, sufficient on any document.

Sec. 17. Providing that documents issued by officers in the exercise of their governmental functions, should be exempt from stamp tax.

The foregoing are all of the provisions of the War Revenue Act relating to documentary stamp taxes; and they all relate *exclusively* to documentary stamp taxes, except Sec. 6 (the latter part of which contains a paragraph relating to Schedule B, referring to stamps on merchandise), and Secs. 8, 9 and 25, which refer to all the stamps provided for in the Act.

..These unrepealed provisions consist of (1) penalties for the misuse or non-cancellation of adhesive stamps generally; (2) certain penalties to enforce the payment of documentary stamp taxes, and applying exclusively to them (Secs. 7, 11, 13, 14 and 15); (3) a qualification or mitigaton of the strictness of the documentary stamp law, by making any legal documentary stamp, of the proper amount, sufficient (Sec. 16), by excepting from the operation of the law documents issued in the exercise of governmental functions (Sec. 17), and by providing in Sec. 13 a method for removing the disabilities of such instruments by post-stamping.

Although all of the provisions imposing documentary stamp taxes have been repealed, yet none of the penalties provided by the War Revenue Act to enforce the collection of such taxes, and which exist exclusively for that purpose, have been repealed, except Sec. 18, requiring stamps on telegraphic messages and imposing a penalty for violating the requirement.

The retention in the law of these penalties, of the ex-

emptions from taxation, and of the provision for post-stamping, shows it to have been the intention or understanding of Congress that stamp taxes already due were to be collected. Especially would the provision in Sec. 13, for the post-stamping of instruments from which the stamps had been omitted, be useless if the tax had been remitted.

Said tax is still due and payable, also, despite the repeal of that part of the revenue law imposing it, by virtue of Sec. 13 of the Revised Statutes of the United States, which reads as follows:

"The repeal of any staute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing Act shall so expressly provide * * * *."

The defendant Mary McCaffery became "liable" or "incurred a liability" for the payment of this stamp tax immediately upon the execution of this declaration of homestead; and said Sec. 13 of the Revised Statutes perpetuates this liability, despite the repeal of the provision imposing the tax. And Congress, therefore, naturally, retains unrepealed the government's remedies for the enforcement of this liability, the qualifications and exceptions thereto, and the opportunity to escape this liability by post-stamping.

In the Decisions of the Commissioner of Internal Revenue, Vol. 4, page 155, the Treasury Department ruled, that where the amount of stamps required on a deed was reduced by the amendment of 1901, an instrument executed before the amendment must be stamped according

to the original law, and cannot be recorded if stamped according to the amended law. The ruling is as follows:

"If a deed conveying realty and executed prior to July 1st, 1901 (when the amendment of the Revenue Law, reducing the stamp tax on deeds, took effect), is presented for record after said date, it will require a revenue stamp to be attached according to the law now in force (that is, on June 21st, 1901, the date of the ruling), before the same can be recorded."

Now that the later amendment of 1902 has reduced the tax to nothing, the same principle must apply, and the deed or other instrument must be stamped according to the law in force when the instrument was executed.

In Foster vs. Holley's Administrators, 49 Ala. 593, the Court says, referring to the repeal of a Federal stamp tax:

"It is contended by the learned counsel for the appellant, that the repeal of so much of the law as affects the case releases such a contract from the law in force before the repeal. It does not seem to be so intended. The repeal is special, and looks wholly to the future, and does not seem to be intended to operate on contracts previously entered into. It is not a repeal of the whole law, but only a repeal of so much as imposes taxes on certain instruments. It does not, therefore, affect this case."

The same language would aptly apply to the present case.

NEITHER THE HOMESTEAD DECLARATION NOR THE ALLEGED RECORD THEREOF WERE ADMISSIBLE IN EVIDENCE AT THE TRIAL.

Section 7 (unrepealed) of the War Revenue Act, provides:

"That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper, of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, * * * * such instrument, document or paper, as aforesaid, shall not be competent evidence in any Court."

Section 14 provides:

"That hereafter no instrument, paper or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any Court until a legal stamp or stamps, denoting the amount of the tax, shall have been affixed thereto, as prescribed by law * * * *."

And section 15 provides:

"That it shall not be lawful to record or register any instrument, paper or document required by law to be stamped, unless a stamp or stamps of the proper amount shall have been affixed and canceled in the manner prescribed by law; and the record, registry or transfer of any such instruments, upon which the proper stamp or stamps aforesaid shall not have been affixed and canceled as aforesaid *shall not be used in evidence.*"

These provisions were in force at the time of the trial and are still operative: (1) Because they have never been repealed; (2) because, together with other unrepealed

penalties for non-stamping, they are necessary to the collection of the documentary stamp taxes which, at the time of the repeal of the part of the law imposing them, were due and unpaid; and (3) under Sec. 13 of the Revised Statutes of the United States, above quoted.

There is nothing in the Acts of 1901 and 1902 to indicate that Congress, in repealing the provisions imposing documentary stamp taxes, intended the repeal to operate retrospectively, so as to remit stamp taxes which had been evaded or innocently left unpaid; on the contrary, it clearly appears, from the retention unrepealed of the foregoing sections excluding unstamped instruments from evidence and record, and of Sec. 13 of the War Revenue Act, providing for post-stamping unstamped instruments on payment of a penalty, that Congress intended these provisions to be used to enforce the payment of taxes due and unpaid at the time of the repeal.

The retention of these provisions has the effect of a general proviso that, despite the repeal of the tax, unpaid taxes should still be collected. "An express saving clause is not required to save the right to collect." State vs. Sloss (Ala.) 3 Southern, 745.

Even if the stamp tax on the homestead declaration had been remitted, the penalties of exclusion from evidence and from record (Secs. 7, 14 and 15 of the War Revenue Act) would still remain enforceable, not only because these penal sections are still unrepealed, but also under Sec. 13 of the Revised Statutes, which provides:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability

incurred under such statute, unless the repealing act shall so expressly provide * * * *."

The word "liability" in said section is construed in United States vs. Ulrici, 3 Dillon 532, as "intended to cover every form of punishment to which a man subjects himself by violating the common laws of the country." The Court further says: "Moreover, any man using common language might say, and very properly, that Congress had subjected a party to a liability, and if asked what liability, might reply, a liability to be imprisoned."

One might say, even more appropriately, in the present case, that Congress had subjected a party to a liability to have his homestead declaration excluded from evidence and record, if not stamped.

The foregoing construction of the statute is quoted with approval in United States vs. Reisinger, 128 U. S. 402, where the Court says that Congress intended Sec. 13 to apply to all offenses.

In 23 Fed. 74, the Court says, construing Sec. 13, R. S.: "Penalty is the punishment inflicted by law for its violation. The term is mostly applied to pecuniary punishment, but it is not exclusively so. The case of U. S. vs. Ulrici (supra) is in point on all of the propositions urged on behalf of the defendant: In that case Mr. Justice Miller * * * * held that Sec. 13 R. S. contains a general provision changing the rule of the common law * * * * and he says that the section was intended to repeal the rule."

In 32 Fed. 24, Eastman vs. Clackamus Co., the Court says: "It is admitted in the case of what are called penal

statutes that there has been a more marked disposition on the part of the Courts to hold that repeal thereof destroys or takes away all existing rights of action thereunder without express declaration to that effect. But the rule is an arbitrary one, and never had anything to commend it, except in the United States an undue sympathy for wrongdoers, and in England an early prejudice among common law judges against "statute made law." By the Act of Feb'y 25, 1871 (Sec. 13 R. S.), Congress abrogated it."

In United States vs. Barr, 4 Saw. 254, the Court says: "The 'liability' of the defendant for the act charged in the indictment, consisted in his being bound or subject to punishment for it * * * * and this liability was 'incurred,' met with or run against, when such act was committed. Sec. 13 declares that the substitution or repeal of Sec. 5457 shall not have the effect to 'extinguish' this liability, which is equivalent to declaring * * * * that said Sec. 5457 shall, for the purposes of this prosecution, be considered still in force." The Court goes on to say that Sec. 13 is a salutary provision.

There are some decisions by State Courts construing Sec. 14 (supra) of the Revenue Law, imposing on Courts the duty of excluding unstamped instruments from evidence, which hold that said statute is not binding on State Courts, on the ground that Congress has no power to impose a rule of evidence on State Courts. But these same decisions concede that said section is binding on Federal Courts. While the duty of State Courts in the matter does not necessarily arise in this case, yet it may be fairly con-

tended that the law of Congress is binding upon State as well as Federal Courts, and that the abrogation of this law in any respect by a State Court is a modern form of nullification.

Congress was warranted in excluding from evidence and record even those instruments which had been innocently left unstamped, by reason of the method provided in Sec. 13 of the War. Rev. Act (amended by Sec. 7 of the Act of March 2, 1901), for removing the disability from the instrument by post-stamping the same before the Collector, who is authorized to remit all penalties if he deems the omission to stamp to have been innocent.

THE RECORD OF THE HOMESTEAD DECLARATION, BEING FORBIDDEN, WAS A NULLITY.

The following authorities hold that an unauthorized record of an instrument is a nullity.

Cyclopedia of Law, 2d Ed. Vol. 24, page 142:

"If an instrument * * * * though within the contemplation of the (recording) statute, be not entitled to record because of * * * * a failure to comply with some of the pre-requisites to recordation, the record thereof will be a mere nullity."

And on page 101: "Under the statutes of most of the states a valid acknowledgment, or proof of execution, is made a prerequisite to registration of an instrument; and the recording of an unacknowledged or defectively acknowledged instrument has no effect whatever."

And in volume 1, page 490, under the head of "Acknowledgments," it is stated: "In most of the states it is held

that registration of an unacknowledged or defectively acknowledged instrument, without due proof of execution, is a mere nullity."

Such a record is expressly held to be a "nullity" in the following cases:

Hill vs. Gordon (Fla.) 45 Fed. 279.

Townsend vs. Edwards (Fla.) 6 So. 212-213.

In Sigourney vs. Larned, 27 Mass., 72-74, the transcript of such an instrument on the records is said to be "not a record."

In Work vs. Harper, 24 Miss. 517, it is said to be "a nullity as to all the benefits conferred by statute upon a properly registered instrument."

In De Witt vs. Moulton, 17 Me. 418, it is said that the registry of a deed without acknowledgment is "illegal and gives no rights."

In McMinn vs. O'Connor, 27 Cal. 239-245, it is said that "Deeds not properly acknowledged or proved, but filed for record or recorded in the proper book of the proper county, are not duly filed for record nor duly recorded."

In 24 Mich. 145, Buell vs. Irwin, it is said to be "not evidence."

In 4 Fla. 465, Sanders vs. Papoon, it is said that an instrument so transcribed on the records "is not entitled to be regarded as a registered instrument."

In Stallings vs. Newton (Ga.) 36 S. E. 227, it is said that if a deed be not attested or acknowledged, "its registration is wholly ineffective and accomplishes no purpose." And the record of such an instrument was "ineffectual to

give it more incidents than it would have if it had not been recorded at all."

In Gardner vs. Grannis, 57 Ga. 539-554, the Court intimates that where a deed, which is insufficiently proved, is recorded, the record is not an official record.

In Budd vs. Brooks (Md.) 43 Am. Dec. 321-333, it is said that such a pretended record is no more evidence of the existence of a deed than would be a copy of the deed certified by a private individual.

An instrument not entitled to record because not acknowledged, or with a defective acknowledgment, is the most obvious example of the class of instruments described above as being not entitled to record, though within the contemplation of the recording statutes, because of a failure to comply with some of the pre-requisites to recordation, and the record of which is therefore a mere nullity.

But lack of other pre-requisites to recordation has the same effect.

Thus, in Pfaff vs. Jones, 50 Md. 263, it is said: "The clerical act of registering a mortgage after the time allowed by law is null and void."

In Hall vs. Redson, 10 Mich. 21, where a deed was required to have two witnesses in order to be recorded, but it had only one witness, the record of it was held entirely inoperative either as notice or evidence.

In Gill vs. Strozier, 32 Ga. 688, it is stated that "If a paper recorded is not one authorized to be recorded, *nor is recorded in the terms of the law,* it is in neither case a record, and a copy of such paper found in the Clerk's books

is entitled to no more credit or weight than one found on the books of a private person."

In Choteau vs. Jones, 11 Ill. 300, it is said: "Registration of an unacknowledged deed gives it no additional validity nor effect."

In Richardson vs. Shelby (Okla) 41 Pac. 378, where a chattel mortgage was required to be registered in order to be valid, it was held that the registry, is unauthorized, or if made otherwise than in compliance with the law, would be treated as a mere nullity.

And in Parrett vs. Shaubut, 5 Minn. 323, it was held that a record, if for any reason unauthorized, is a mere nullity.

In section 14 of the War Revenue Act (unrepealed), it is provided:

"That hereafter no instrument, paper or document required by law to be stamped, which has been signed or issued without being stamped, or with a deficient stamp, nor any copy thereof, *shall be recorded* or admitted, or used as evidence in any Court until a legal stamp or stamps, denoting the amount of the tax, shall have been affixed thereto as prescribed by law * * * *."

And Sec. 15 of the same act provides:

"That it shall not be lawful to *record or register* any instrument, paper or document required by law to be stamped unless a stamp or stamps of the proper amount shall have been affixed and canceled in the manner prescribed by law; and the record, registry or transfer of any such instruments upon which the proper stamp or

stamps aforesaid shall not have been affixed and canceled as aforesaid shall not be used as evidence."

The due stamping of an instrument is, therefore, a "prerequisite to recordation" as fully as an acknowledgment. Under the foregoing decisions, accordingly, the record of an unstamped instrument is a "nullity," and whatever effect the repeal of the stamp tax may have, it can have no effect to make a record valid which, when made, is a nullity. The homestead declaration in question was recorded in its unstamped condition. The record there thereof has at all times been a nullity and no record, and therefore there has never been any homestead in the premises in question.

It is provided in the Civil Code of Montana, Sec. 1702 (Cal. Sec. 1264):

"The declaration must be recorded in the office of the county in which the land is situated."

And Sec. 1703 (Cal. Sec. 1265) provides:

"From and after the time the declaration is filed for record, the premises therein described constitute a homestead."

As is said in 63 Mo. 394, "The object of fixing the date of filing as the date of constituting the homestead, is to establish an unalterable criterion to govern all cases where disputes might arise as to the period when the homestead is acquired." It is not thereby intended to dispense with the necessity of recording as an essential to the homestead. It is said in 110 Cal. 198, "The mode of creating a homestead in lands as prescribed by Secs. 1262-1264 (Mont. Secs. 1700-1702) is exclusive."

It is said in 35 Pacific 646 (Cal.), under a statute providing that an instrument is deemed to be recorded when deposited with the proper officer for record, that the instrument must be recorded, and the recording, when completed, relates back to the date of the deposit for record.

Here, also, the recording is necessary, and when completed relates back to the date of the deposit for record, which is the date of the creation of the homestead, other conditions being fulfilled. In contemplation of law, the filing and recording take place at the same moment of time. Both are necessary. The paper is filed only in order that it may be recorded. If for any reason the paper filed cannot be recorded, as, where it lacks an acknowledgment or a stamp, then the paper is not "duly filed" and does not contribute to or fix the date of the creation of the homestead.

The "filing for record" of an instrument not allowed by law to be recorded is a nullity.

It has been held in some state cases that the prohibition against recording unstamped instruments was either beyond the power of Congress, or was designed to apply only to Federal recording offices.

In Chartiers vs. Robinson & Turnpike Co., 72 Penna. 278, however, it is said:

"The word 'recorded' in the statute refers to state offices of record, as the United States have no offices for recording deeds, mortgages, powers of attorney and other documents forbidden to be recorded until the proper stamp tax is paid;" and the Court says that Congress has the constitutional power to impose such a prohibition.

Sec. 15 of the War Revenue Act (supra), prohibiting the recording of unstamped instruments, is construed in the case of Farmers' Loan & Trust Co. vs. Electric Light Co., 90 Fed. 806, where, a Master's deed having been presented to the County Recorder to be recorded, he refused to receive or record it because it bore no revenue stamps, and claimed that Schedule A of the War Revenue Act required the deed to be stamped. A rule was issued requiring him to show cause why he should not file and record the same unstamped. The Court held that the deed must be stamped in order to be recorded.

And in the case of Dowell vs. Appelgate, 7 Fed. 881, the Court, in construing a similar provision, says: "It is plain that this section in no wise affects the validity of the original conveyance, but is confined to excluding it from the privilege of record."

CONCLUSIONS IN RESPECT TO OMISSION OF STAMP.

(1) The certificate of acknowledgment to the homestead declaration in question required a stamp, as a "certificate required by law, not otherwise specified in this Act."

(2) The subsequent repeal of the tax on such certificate in the amendatory Act taking effect July 1st, 1901, did not relieve the defendants from the necessity of paying it.

(3) Secs. 7 and 14 of the War Revenue Act, prohibiting the admission in evidence of an unstamped instrument, and Secs. 14 and 15 prohibiting the recording

thereof, are still in force, unrepealed, and therefore the admission in evidence of the homestead declaration and of the pretended record thereof, was error.

(4) Said record, being forbidden, was a nullity when made, and void, as was the "filing for record" of the unstamped instrument. These are both pre-requisites to the creation of a homestead, and therefore no homestead ever came into existence. The judgment should therefore be reversed.

II.

THE FEDERAL HOMESTEAD QUESTION.

(Transcript p. 29, l. 16 et seq.)

The defendant Joseph McCaffery made homestead entry of 160 acres of government land in Montana on July 15th, 1896. On November 26th, 1900, the defendant Mary McCaffery, the wife of Joseph, declared a state homestead on property in Anaconda, Montana. On December 16th, 1901, final certificate was issued to Joseph McCaffery on his government homestead entry; and a patent therefor was issued to him on October 11th, 1902.

It is provided in Montana C. C. Secs. 1676 and 1677 that "a homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged by the husband and wife, if the claimants are married;" and "the abandonment is effectual only from the time it is recorded." The same provisions are found in the Civil Code of California (C. C. Secs. 1243-1244), and

in the statutes of Arizona (Sec. 2075), and Idaho (Sec. 3041).

Under this provision said method of abandonment is exclusive. The homestead cannot be abandoned by removal from the premises with the intent of not returning, or by establishing a home elsewhere.

Porter vs. Chapman, 65 Cal 365.

Tipton vs. Martin, 71 Cal. 325.

Waggle vs. Worthy, 74 Cal. 266.

Lubbock vs. McMann, 82 Cal. 226.

Simonson vs. Burr (Cal.) 54 Pac. 87.

In Tipton vs. Martin, 71 Cal. 325, on injunction against execution sale of property claimed as a homestead, the defendant alleged:

"That in the month of ——, 1878, the plaintiff removed from said premises and from this state, and freely and voluntarily removed into the Territory of Montana with the intent of remaining there and residing there permanently, and without any intention of returning again to this state or upon said premises, and have since said month of ——, 1878, continuously resided in said Territory of Montana, and do now reside therein, and since they moved into said Territory of Montana the said John C. Tipton has taken the initiatory steps to acquire title therein to United States land under and by virtue of the U. S. Homestead Laws, and the said application for said land under the U. S. Homestead Laws is still pending."

The plaintiff demurred to the sufficiency of the facts

thus pleaded and the demurrer was sustained, from which ruling an appeal was taken and the ruling affirmed.

Under this decision, if the plaintiff, instead of filing on a government homestead in Montana, had declared on a state homestead there, the conclusion of the California Court would have been the same; the California homestead would not have been affected. But would the second state homestead in Montana have been valid? Unquestionably not. For, if such a second homestead would be good, then the second homestead would be good against a third homestead thereafter established in Idaho; and a fourth, fifth and sixth homestead would all be valid in still other states, and so on, until homesteads might be established in every state having this provision as to abandonment, all exempt from the claimant's creditors.

It is accordingly held that a man cannot have two homesteads; and that if he attempts to acquire a second while the first is in force, the second is void.

Cyc. of Law, 2d Ed., Vol. 15, p. 602.

Freeman on Executions, Sec. 204 (3d Ed., p. 1299).

Waggle vs. Worthy, 74 Cal. 266.

First Nat'l Bank vs. Massengill, (Ga.) 5 S. E. 100.

Archibald vs. Jacobs, 69 Tex. 249.

Cornish vs. Fries, 43 N. W. 507.

In the case above discussed, the plaintiff's California property was held to be his homestead, although for more than ten years it had ceased to be his home or residence, and although he had established his home elsewhere, and

taken formal steps to establish a *homestead* outside of California.

It is universally held that a man cannot have two homesteads at the same time.

(See citations immediately foregoing.)

Also:

Estate of Phelan, 16 Wis. 77.

Palmer vs. Hawes (Wis.) 50 N. W. 341.

Beard vs. Johnson (Ala.) 6 So. 383.

Rouse vs. Caton (Mo.) 67 S. W. 578.

Achilles vs. Willis (Tex.) 16 S. W. 746.

Tourville vs. Pierson, 39 Ill. 446.

Wright vs. Dunning, 46 Ill. 271.

Goodale vs. Boardman, 53 Vt. 92.

Horn vs. Tufts, 39 N. H. 478.

Kaes vs. Gross, 92 Mo. 647.

Gerrish vs. Hill, 66 N. H. 171.

Sarahas vs. Fenton, 5 Kans. 592.

Freeman on Executions, Secs. 241 and 248 (3d Ed. pp. 1305, 1351).

Waples on Homesteads, p. 146.

As the Court says in Kaes vs. Gross, 92 Mo. 647, "The whole theory of the law is repugnant to the idea of two homesteads being in existence at the same time * * * * *. She could not lawfully have two homesteads at the same time, any more than she could lawfully have two husbands at the same time."

It is also true that there cannot be two separate homesteads, one declared by the husband and the other by the wife, upon separate parcels of land.

Cyc. of Law (2d Ed.) Vol. 15, p. 566.

Thompson on Homesteads, Sec. 225.

Beard vs. Johnson (Ala.) 6 So. 383.

Rosenburg vs. Jett, 72 Fed. 90.

Gambette vs. Brock, 41 Cal. 83.

Rouse vs. Caton (Mo.) 67 S. W. 578.

Nor can a man and his wife hold two government homesteads.

Dec. of the Int. Dept. relating to public lands:

Vol. 9, p. 426, L. A. Tavener.

Vol. 13, p. 734, William A. Parker.

Vol. 21, p. 430, Thompson vs. Talbot.

We believe, after careful investigation, that there is not a single authority holding that a man (or a man and his wife, while they are living as husband and wife), can hold two homesteads, whether in the same or in different states, whether state or Federal homesteads.

In the case now before the Court, the two alleged homesteads are not in different states, but are both in Montana, though created under different laws, and the Court has jurisdiction over both.

In Hesnard vs. Plunkett (S. D.) 60 N. W. 159, the plaintiff, while living on his state homestead of 160 acres, took up an adjoining 160 acres of government land as a federal homestead. His buildings were situated on 19

acres of his state homestead; he sold this 19 acres and moved his buildings and his residence upon a part of the federal claim, adjoining the state homestead. He then made claim to the 141 acres of the original state homestead and the adjoining 19 acres of the Federal claim, to which his buildings had been moved, as a state homestead. His state homestead claim and his government homestead claim, therefore, overlapped each other to the extent of the 19 acres to which his buildings had been moved, said 19 acres being claimed as a part of each homestead.

The court held that, although he actually lived on both claims at the same time, that, nevertheless, in the contemplation of law, he could not be considered as living on both at the same time; that he was in contemplation of law occupying the government homestead claim and nothing else; that while he resided on a government claim for the purpose of getting title to the same, he could not at the same time claim to reside on land outside of the government claim, within the meaning of the state homestead law, and claim the latter as exempt under the state law; that by claiming 141 acres of his state claim under the state law he asserted that he was claiming from the government only 19 acres of the government homestead, or only enough to make up 160 acres, which was untrue.

The syllabus by the Court reads:

"One who claims a government homestead under the laws of the United States, and is settled upon and occupying the same for the purpose of acquiring title thereto, cannot, before he is entitled to a patent therefor, hold a

homestead under the state law embracing 19 acres of such government homestead claim and 141 acres of such pre-emption claim for which a patent has been issued to him and from which he removed to the land embraced in his government homestead claim."

The phrase, "before he is entitled to patent therefor," indicates that after obtaining a patent for the government homestead claim he *could* so hold both because he would not then be required to live on the government homestead. But the Court says: "He cannot be permitted, when dealing with the government, to say he claimed 160 acres as his government homestead and when dealing with his creditors to say that he only claimed 19 acres of the same."

The Court might say with even more emphasis that, if he had first entered the government land as a government homestead, but never lived on the same (though subsequently submitting false proofs and thereby securing a patent thereto), but took up his residence, after making said government filing, on adjoining land owned by him, and asserted a state homestead right in the land that he owned and resided on, that he would not be allowed to say (nor would his wife be allowed to say for him), when dealing with the government, that he claimed the government land as his government homestead, but, when dealing with his creditors, to say that he didn't claim any of it.

Undoubtedly, in the sense that a man is said to live or make his residence on a farm, the plaintiff in that case did reside on the entire 301 acres; and such residence would not be inconsistent with his claiming a portion of the 301 acres as either a state or a federal homestead. He might

have legally claimed a state homestead in the same 160 acres whch he claimed as a government homestead, as was held in Watterson vs. Bonner, 19 Mont. 554, or in a part thereof, provided his state claim did not extend beyond the borders of his government claim. It is equally true, as his house was on the overlapping parts of the two claims, that he actually did live on each claim, in strict compliance with both the state and federal law as far as appears. The fact of residence, therefore, may be left out of account in the consideration of the case, although the Court lays considerable stress thereon, because he did comply with the letter of the law as regards residence; actual residence, under the circumstances, was a false quantity. It was the spirit of the law which he violated, in claiming a double exemption, in trying to hold as exempt more land than either the state or the federal law contemplated he should, in trying to hold a separate homestead under each law, all exempt from his creditors.

It may be that, after obtaining a patent to a government homestead, a man may acquire a state homestead; but, while he is required to reside on the government homestead, or while he is holding the same as exempt by virtue of his supposed residence thereon, the government not having declared any forfeiture against him for failure to comply with the requirements as to residence, and the claimant showing by his procurement of a patent from the government at the end of five years from his original entry that he never intended to abandon his claim of homestead therein, such government land is in the contemplation of

the federal law his homestead, and neither he nor his wife can acquire an additional homestead under the state law.

It follows from the foregoing principles that a man cannot hold a government homestead (at least before patent), and his wife at the same time hold a state homestead.

A government homestead differs from a state homestead in this state principally in the following respects:

1. The husband can alienate the government homestead without the consent of his wife.

2. A person who is not the head of a family may acquire a government homestead.

3. The government homestead is exempt only from debts incurred before patent.

But practically the same differences exist between the state homesteads of the various states; and yet it could not be claimed that one could acquire a second homestead while the first was still subsisting, in another state, merely because these differences existed between the homestead laws of the two states.

Thus, there are many states where the husband can alienate the homestead without the consent of the wife, though this rule has been abrogated in some states where it formerly existed.

Wright vs. Whittick, 31 Pac. 490 (Colo.).

Cook vs. Higley, 37 Pac. 336 (Utah).

Shields vs. Horbach, 68 N. W. 527 (Nebr.).

Rector vs. Rotton, 3 Nebr. 171.

State Bank vs. Carson, 4 Nebr. 498.

Massay vs. Womble, 69 Miss. 347.

Lindsay vs. Norrill, 36 Ark. 545.

Lewis vs. Curry, 74 Mo. 49.

Riecke vs. Westenhoff, 85 Mo. 642.

Hemphill vs. Haas, 11 S. W. 510 (Ky.).

Kennedy vs. Stacey, 1 Baxt. 220 (Tenn.).

There are also several states in which a person who is not the head of a family can acquire a homestead.

Cal. C. C. Sec. 1260.

Greenwood vs. Maddox, 27 Ark. 648.

Meyers vs. Ford, 22 Wis. 139.

Hesnard vs. Plunkett, 60 N. W. (S. D.) 159.

As to the extent and range of the exemption, the exceptions thereto, and the length and period of time it covers, there is the greatest diversity between the different states.

It might be claimed that a federal homestead before patent is a very different thing from a state homestead, because the title to the former is in the government. But the homestead claimant in Montana is not required to own the land; if he has a right to live on the ground, he has also a right to declare a homestead thereon, which will protect his right in the land from execution, however slight that right may be. Title in homestead is, therefore, said to be a "false quantity."

Watterson vs. Bonner, 19 Mont. 554.

Brooks vs. Hyde, 37 Cal. 373.

King vs. Gotz, 70 Cal. 241.

Alexander vs. Jackson, 92 Cal. 514.

Moreover, it is held that the government homestead claimant does have, before patent or final proof, an inchoate title and a vested right. Land vs. Morey, 42 N. W. 88 (Minn.).

He has an interest which he can mortgage.

Dickerson vs. Cuthburth, 56 Mo. App. 652.

Watson vs. Voorhees, 14 Kan. 330.

Weber vs. Laidler (Wash.) 66 Pac. 400.

Mudgett vs. R. R. Co., Dec. In. Dept. relating to Pub. Lands, Vol. 8. p. 243.

A Montana state homestead, therefore, differs from government or federal homesteads only as it does from state homesteads in other states.

In a federal homestead the government policy has three objects:

First. To provide homes for settlers and to protect such homes by exemptions from execution.

Second. To promote the growth and development of the country by inducing settlers to accept such homes.

Third. To derive revenue from the sale of public lands.

But the last named purpose is really subordinate and incidental, as the government holds the public lands merely for its citizens, and the theory of the homestead law is that the government devotes these lands most effectually to the service of its citizens by providing and protecting

homes for them thereon. The price exacted therefor is nominal. The paramount purpose is to provide and protect homes for citizens. Essentially the same purpose is the basis of any state homestead law. A state, to be sure, does not provide the ground for the citizen to establish his home on, but it seeks by the homestead law to induce him to provide one for himself, and then protects him in the enjoyment of it.

The following conclusions are deduced from the foregoing authorities and argument:

1. A man, or a man and his wife, cannot have two state homesteads, whether in the same or in different states, whether in the same or in different jurisdictions, whether created or sought to be created under the same or differing laws.

2. So long as he has a state homestead in one state, recognized and held exempt as such by the laws thereof, neither he nor his wife can establish a state homestead in another state in which they may have taken up their residence. And if they attempt to do so, the second homestead is void.

3. Government homesteads have the essential characteristics of the state homesteads of the various states; and differ from state homesteads in Montana only as the latter differ from state homesteads in other states.

4. It must follow that, while a man has a subsisting government homestead, upon which he is acquiring title under the laws of the United States, which is recognized and held exempt as such by said laws, neither he nor his wife can establish a state homestead on other lands on

which they may have taken up their residence; and if they attempt to do so, the second homestead is void.

The Land Office records offered in evidence and refused sufficed to show that Joseph McCaffery, at the time his wife filed her homestead declaration on her Anaconda property, had a subsisting unpatented government homestead. This being so, his wife could not acquire a second homestead under the state law. Whether he was living on said government land during the five years between his original filing and his patent or not, is a question between himself and the federal government; it did not affect the existence of his federal homestead right until, in case of non-residence or insufficient residence, the government elected to declare the homestead forfeited, which they did not do, as shown by the issuance of a patent to Mr. McCaffery at the end of the five years.

Sec. 2297 of the Revised Statutes provides:

"If at any time after the filing of the affidavit, as required by Sec. 2290, and before the expiration of the five years mentioned in Sec. 2291, it is proved, after due notice to the settler, to the satisfaction of the Register of the Land Office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, *then and in that event the land so entered shall revert to the government.*"

His homestead right continues until, after due notice to him, certain proofs are made before the land office; this was not done, as shown by the issuance of patent. Therefore he had a subsisting homestead right at the time his wife made her declaration. The case is thus brought

within the rule of the cases heretofore cited, holding that where the homestead right has once been initiated, mere subsequent non-residence does not forfeit the claimant's homestead right therein, and the attempt of the claimant or of his wife to acquire a second homestead is void.

In some states, the claimant's removal from the homestead without the intention of returning, and his establishment of a permanent residence elsewhere, are held to forfeit his homestead right. But in case of a government homestead, non-compliance with the requirements as to residence does not *ipso facto* forfeit the claimant's homestead right; the government can waive its right to take the homestead away from him for such non-compliance; and until the government declares a forfeiture he still has a subsisting homestead right in the land. A government homestead, therefore, belongs to the class of homesteads which are not forfeited by non-residence.

Joseph McCaffery legally "entered" said land as required by law by making formal application for the land, and filing the preliminary affidavit and paying the fees required by Sec. 2290, Rev. Stats. U. S.

Hastings, etc., Ry. vs. Whitney, 132 U. S. 357-363.

By such entry the land became segregated from the public domain and appropriated to private use; his homestead right thereby attached to and became fastened to the land, and he acquired an inchoate title which by future residence and cultivation could ripen into a perfect title.

Kansas Pac. Ry. Co. vs. Dunmeyer, 113 U. S. 629-644.

Nelson vs. Big Blackfoot M. Co. 17 Mont. 553-554.

Graham vs. Hastings & Dakota Ry. Co. 1 Land Off. Dec. 362.

Such homestead right was unassailable until some fail-use to comply with the law. Upon failure to comply with the requirements as to residence, the homestead right became, not void, but voidable.

Sec. 2297, Rev. Stats. U. S., quoted supra.

Whitney vs. Taylor, 158 U. S. 85.

Hastings Ry. Co. vs. Whitney, 132 U. S. 357-363.

Graham vs. Hastings & Dakota Ry. Co. 1 Land Off. Dec. 362-364.

Schrottberger vs. Arnold, 6 Land Off. Dec. 425.

St. Paul & Co. Ry. Co. vs. Forseth, 3 Land Off. Dec. 446.

Hastings & Dakota Ry. Co. vs. United States, 3 Land Off. Dec. 479.

United States vs. Turner, 54 Fed. 228.

In the present case no proceeding under Sec. 2297, Rev. Stats., quoted supra, was ever decided against Joseph McCaffery, as shown by the issuance of a patent to him. Whether he had lived on his homestead claim or not therefore his homestead right was subsisting and intact at the time of the filing of his wife's declaration of homestead; and such attempt by her to establish a second homestead was void.

In the homestead law of every state, it is an implied

or express condition to the establishment of a homestead that the claimant does not already possess one, either in the same or in another state.

Sec. 1700 of the Montana Civil Code provides:

"In order to select a homestead, the husband or other head of a family, *or in case the husband has not made such selection,* the wife must execute and acknowledge in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record."———

Under this section, the wife cannot select a homestead if the husband has selected one. There is no reason why the words "in case the husband has not made such selection" should be construed to apply only to a selection by the husband in Montana; it is fair to presume, in view of its being the policy of the law not to allow the husband to have a homestead in one state, and the wife to have a homestead at the same time in another state, that the words "such selection" were intended to apply to a selection by the husband either in Montana or in any other state, and either under the Montana state law or the law of some other jurisdiction, as, for, instance, a selection by him of a government homestead. Such would be the literal interpretation of the words in question. Applying the words "such selection" in the statute to the selection by the husband of a government homestead, it would follow that the only condition under which the wife could select a homestead did not exist, and that the homestead sought to be established by her was void.

Montana C. C., Sec. 1701, provides:

"The declaration of homestead must contain:

"1. A statement that the person making it is the head of a family; or when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit * * * *."

While Joseph McCaffrey, in the affidavit required by Sec. 2290 of the Revised Statutes of the United States (as amended by the Act of March 13th, 1891, c. 561, Sec. 5), by which he initiated his government homestead claim, did not make a declaration of homestead which would have been sufficient to initiate a state homestead in Montana, yet he did in such affidavit make a formal written statement that he "was the head of a family;" "that such application was honestly and in good faith made for the purpose of actual settlement and cultivation" * * * * and that he "would faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for" * * * * and that he "does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself." These averments bear a close resemblance, generally speaking, to a homestead declaration. For the reasons above given, the requirement that the wife's declaration contain a statement showing "that her husband has not made such declaration," must be held to mean that she must show that he has not made a declaration of homestead in Montana or in any other state, or on government land; and if he has already made a declaration of home-

stead securing him a homestead exemption elsewhere, whether made according to the requirements of the Montana law, or those of some other state or of the United States, then her averment in her declaration that her husband "has not made such declaration" is false, and her declaration therefore void.

Her declaration must also contain a statement that she "makes the declaration for their joint benefit." But she is not entitled to make the declaration for their joint benefit if he is not entitled to such benefit; and he is not entitled to the benefit of a homestead declared by her, when he is making claim to and enjoying a government homestead exemption.

The homestead filing on public lands should have been admitted in evidence, as tending to show whether or not the claim of homestead in the Anaconda property by Mrs. McCaffrey was made in good faith.

Power vs. Burd, 18 Montana 22.

The ruling of the Court that the plaintiff in error could not introduce the record evidence of Mr. McCaffery's filings, proof and patent, without showing that he had lived on his government homestead claim, was something that should not have been required of the plaintiff, inasmuch as it was something peculiarly within the knowledge of the opposite party. And as shown above, also, his non-residence upon his homestead claim was a defect of which the government alone could take advantage.

III.

THE TWO-HOUSE QUESTION.

(Transcript, pp. 30-40, incl.)

A HOMESTEAD CANNOT INCLUDE TWO DWELLING HOUSES, ONE OF WHICH IS OCCUPIED BY THE CLAIMANT AND THE OTHER LET TO TENANTS.

Mont. C. C. 1670 (Cal. 1237) provides:

"The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided."

Sec. 1693 (not in California) provides:

"Homesteads may be selected and claimed:

"Consisting of * * * * a quantity of land not exceeding in amount one-fourth of an acre, being within a town plot, city or village, and the dwelling-house thereon and its appurtenances. Such homestead * * * * shall not exceed in value the sum of Two Thousand Five Hundred Dollars."

The California section, corresponding to Mont. C. C. 1693, provides:

"Sec. 1260. Homesteads may be selected and claimed:

"(1) Of not exceeding Five Thousand Dollars in value, by any head of a family."

In the case of Vincent vs. Vineyard, 24 Mont. 207, the Court, by Mr. Justice Pigott, says: "The Legislative As-

sembly of Montana adopted Secs. 1670-1703 of the Civil Code of 1895 from California, in whose Civil Code they appear as Secs. 1237-1265. In transplanting the homestead law from California to Montana the value of the homestead exemption was reduced to $2,500.00 and a limit upon area fixed."

In the case of Yerrick vs. Higgins, 22 Mont. 502, the Court, by Chief Justice Brantly, says: "The former of these provisions (referring to the two Montana sections above quoted), defines the homestead in general terms; the the latter limits this general definition and specifies particularly the subject matter to which the selection and claim may apply. Standing alone, the general definition would leave no limit to the amount or value of the property selected and claimed, provided that the claimant resided in his dwelling upon it. The sections of our code providing for the selection of a homestead by the head of a family were all adopted into the Code of 1895 from the California Code, except Sec. 1693, which fixes the limitations; this section was brought forward from the First Division of the Compiled Statutes of 1887 and is substantially the same as Sec. 322 of that Code. * * * * In this state the homestead is purely a statutory right."

Sec. 322 Comp. Stats. of 1887, from which Mr. Justice Brantly says Sec. 1693 was taken, and which appears from the above-quoted remark of Mr. Justice Pigott in Vincent vs. Vineyard, to have been taken originally from California, reads as follows:

"Sec. 322. A homestead, consisting of * * * * a quantity of land not exceeding in amount one-fourth of an

acre, being within a town plot, city or village, and the dwelling-house thereon and its appurtenances, *owned and occupied by any resident of this territory,* shall not be subject to forced sale on execution or any other final process from a Court. Provided, such homestead shall not exceed in value the sum of Two Thousand Five Hundred Dollars."

The homestead law has never been construed by the Montana Supreme Court as applied to the rental of property claimed as homestead. We therefore look to the California decisions construing the sections of the Montana Civil Code above quoted.

In Gregg vs. Bostwick, 33 Cal. 220 (which was decided under the California Statute of 1851, which is the same as Sec. 322 above quoted, except that there is no limitation of area, and the limitation of value is $5,000 instead of $2,500), referred to in Thompson on Homesteads, Sec. 130, as declaring a rule on this point, "at once *reasonable* and easy of application," the facts were that a portion of the property claimed as homestead under the declaration was rented to tenants. It was asserted on behalf of the homestead claimant that he was entitled to an exemption of $5,000 worth of real estate, providing only that he had his residence thereon, and that the portion not occupied by himself and family could be used for any purpose he chose, either for carrying on his own business or for rental to tenants. But the Court held: "The homestead law is founded upon the idea that it is good for the general welfare that every family should have a home, a place to abide in, a castle where it can find shelter from

financial disasters and protection against the pursuit of cerditors who have given credit with full knowledge that they cannot cross its threshold. But it is not founded upon the idea that every family ought for the sake of the general good, to be allowed to hold $5000 worth of land free from the touch of honest creditors, provided they reside upon and use some portion of it as a homestead. * * * * The written declaration for which the statute provides does not of itself alone impress upon the land the quality of a homestead. * * * * The premises to be described in the declaration are such and such only as the parties are residing on and using as a homestead at the time their declaration is made. If more is included, it will not for that reason become a part of the homestead, and therefore exempt from execution, notwithstanding the whole may be less than $5,000 in value. * * * * The primary object of all legislation in the subject of homestead is, not to exempt from forced sale a certain amount of real estate of the head of a family, including the homestead, whether estimated by quantity or value, but to exempt the homestead, including the quantity or value, within the limits specified. In some states the exemption does not exceed a certain quantity of land, while in others, as here, the exemption is limited to a certain value. But in neither case is quantity or value the primary object. They come into account merely as restrictions or limitations upon the privilege. Neither quantity nor value can be taken into account as tests as to what the homestead is in a given case, for they in no just sense enter into the definition of a homestead, either

in the abstract or within the meaning of the statute. They do not come into account until the homestead has been ascertained by other tests, and then they operate as limitations. The statute does not provide that "a quantity of land, not exceeding in value $5,000, including wtihin its boundaries the dwelling-house and its appurtenances, shall be exempt." On the contrary, the language is, "*The homestead* consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, not exceeding in value the sum of $5,000, shall be exempt." The difference between the two forms is too obvious for explanation. The former makes the exemption of $5,000 worth of land the primary object, and the homestead merely a necessary incident. The latter makes the homestead the primary and the sole object of the exemption, with a limitation as to value. * * * * The legal meaning of the word "homestead" is also the popular meaning. It represents the dwelling-house with the usual and customary appurtenances, including outbuildings of every kind necessary and convenient for family use, and land used for the purposes thereof." The Court accordingly held that the part rented to tenants was not part of the homestead, though claimed as such.

This case is quoted from at length because it covers all the points we raise in regard to the tenant house, and because it shows the scope and meaning of Secs. 322 and 1693 above quoted, and because the definition of homestead there given was subsequently enacted in statutory form, appearing in Mont. C. C., Sec. 1670, supra.

In the case of Tiernan vs. His Creditors, 62 Cal. 286, a

double house on a 35-foot lot was occupied, one-half by the homestead claimant and the other half by his tenant. The Court held the tenant portion of the premises not included in the homestead. The Court distinguishes the case from that of a person residing in a building and keeping lodgers. A double house is practically two houses and easily divided; it is often the case that one side of such a house is owned by one person and the other side by another person. The Court, therefore, practically decides that a separate and additional house, rented to tenants, is not exempt, especially if built and designed for an independent family. In the case now before the Court the tenant house was complete in itself, with its own kitchen, parlor and bedrooms, a complete house, with its own independent outbuildings, and with its rear yard separated by a fence from the rear yard of the homestead claimant; so that the entire tenant premises were evidently built and designed for the use of an independent family. (Tr. 36.)

In the case of King vs. Goetz, 70 Cal. 236, there was a single lot, 25 feet wide. The owner resided in a house on the rear of the lot, and on the front part of the lot was a house rented to tenants; the latter premises were held not part of the owner's homestead. But the Court held that the fact of the owner's claiming the entire lot under his declaration did not invalidate his claim as as to the part that was really homestead, which was held not subject to execution.

In the case of In re Crowley, 71 Cal. 300, the owner resided on five acres of ground, the remainder of the farm being rented. He nevertheless filed a declaration of home-

stead on all. The Court held that the owner could not file a homestead declaration on the whole so as to include the portion that had never been occupied by him, and which at the time of the declaration was in the exclusive possession and occupancy of his tenant. The Court says: "When part only of the land described in the declaration is actually used and appropriated as the home of the family, the remainder not so used and appropriated, constitutes no part of the homestead claim." In the case now before the Court, although the owner claims to have made some use of a portion of the tenant premises, yet it is undisputed that a portion thereof was, at the time of and long before and ever since the filing of the declaration, in the exclusive possession of the owner's tenant. (Tr. 30-33, and Tr. 37, l. 29.)

In the case of Malony vs. Hefer, 75 Cal. 422, there were two houses on one lot, the front house rented to tenants and the rear house occupied by the owner's family. A homestead declaration was filed on the entire property. The Court held that the front part of the lot never became part of the homestead and was subject to execution. The Court says: "The benign object of the statute was to protect the home of the owner from forced sale, and not to withdraw from the reach of creditors property of the debtor used by the debtor as a source of revenue for "the support of himself and family." In that case, as in the case now before the Court, the two premises were separated by a fence. (Tr. 36.) The Court held that the tenant part did not and could not become a part of the homestead because (as in the case before the Court) not used as a

home for many years prior to the declaration. (Tr. p. 37, l. 19.)

In the case of In Re Allen, first decided in 16 Pacific 319, and that decision reversed in 78 Cal. 293, there were two adjoining lots, the owner's residence on one, and the rear part of the adjoining lot separately enclosed and containing his well, cowhouse and other outbuildings. These portions of the premises were admitted to be homestead. On the front 89 feet of said adjoining lot was a building, a portion of which was rented for a wagon-shop, and the building was also used in part for the owner's business of blacksmithing, said 89 feet of ground being used in connection with these occupations. This 89 feet was held to be not a part of the homestead.

In the case of Lubbock vs. McMann, 82 Cal. 226, a declaration was filed on the owner's homestead lot, on which the owner subsequently built a second house which he rented to tenants. The Court held that the homestead character having once legally attached to the entire property, and it being provided by Cal. C. C. Sec. 1243 (Mont. C. C. Sec. 1676), that, "A homestead can be abandoned only by a declaration of abandonment or a grant thereof, executed and acknowledged by the husband and wife,"—neither the homestead nor any part of it could be abandoned except in the manner provided by statute, and that after the homestead character had once attached, the use of the homestead, or any part of it by the owner, for renting or in any other way, did not make it any the less homestead, and therefore the entire premises, including the tenant premises, were exempt. But the Court said:

"But if at the time of filing the declaration for record, the houses now standing upon this lot had been standing there as they do now, and occupied as they now are, only the one occupied as a dwelling by the owner with the addition of the lot used in connection therewith, would have been impressed with the homestead character. As to the other and the land used in connection therewith, the attempt to dedicate it as a homestead would have been inoperative."

In the case before the Court the tenant premises were such at the time the declaration was filed, and actually occupied by a tenant. (Tr. 37, l. 14.)

In the case of Heathman vs. Holmes, 94 Cal. 291, the Court held, as it had held in Tiernan vs. His Creditors, supra, that using a part of the owner's residence for lodging-house purposes does not deprive the owner of the benefit of a homestead, if he continues to reside therein. But the Court distinguishes the case of Malony vs. Hefer, supra, saying: "In said case there were two houses entirely separate and distinct; the family lived in one and rented the other."

In the case of Huelmantel vs. Huelmantel, 49 Pac. 574, there were two houses on a lot, the rear house occupied by the owner as a home and the front house generally leased to tenants. The owner filed a declaration on all. Held, that only the rear part was homestead.

In the case of In re Ligget, 49 Pac. 211, there were several lots all claimed as homestead under a declaration. On a portion of one lot, separated from the remainder by a fence, was a dwelling-house and appurtenances; it had been rented by the owner at eight dollars a month, but

had not been rented since the filing of the declaration. The Court held that in view of the statutory definition of a homestead, this portion never became part of the homestead.

There are no cases in California opposed to the doctrine of the preceding cases. These cases are all based upon and are practically constructions of the statutory definition of homestead which was adopted in Montana from California in 1895, with the California construction thereof. The Supreme Court of Montana has frequently held that where this state has borrowed a statute from another state, it borrows at the same time the construction placed thereon by the Courts of the latter state, and that such construction is not only to be treated with respect, but is binding on the Courts of this state.

Sharman vs. Enkes, 20 Mont. 557.

Stadler vs. First Nat'l Bank, 22 Mont. 190-203.

B. & B. Co. vs. M. O. P. Co. 25 Mont. 41-73.

State vs. Fortune, 24 Mont. 154-157.

Therefore the dictum in the case of Yerrick vs. Higgins. 22 Mont. 502, supra, where the Court says: "Standing alone the general definition would leave no limit to the amount or value of the property selected and claimed, providing that the claimant resided in his dwelling-house upon it," must be regarded as inadvertent and too broad and general to be an exact statement of the law, because the words of the Court, taken literally, would mean that a man could hold as exempt property within the limit of area

and value, provided he resided on it, though the greater part of it were devoted to business purposes or residence, in separate buildings, by the owner's tenants. The Court's words, if taken literally, put a construction on a statute adopted from California exactly contrary to the obvious meaning of the statute, and also contrary to the uniform construction of the statute by the California Courts, adopted from California with the statute. If, instead of the phrase "providing that the claimant resided in his dwelling upon it," the Court had said, "Providing he occupied it all for residence," or "providing he used it all for homestead purposes," the meaning of the statute as taken from California would have been correctly stated, and it is certainly not a violent assumption to assume that the Court intended by its language to express the latter meaning. Anyhow the expression is a dictum. The Court below decided, on the strength of this phrase, that tenant houses may be properly included in a homestead declaration, although the phrase had been cited by neither side in argument.

The foregoing cases, therefore, construing the statutory definition of homestead as found in Sec. 1670, state the law for Montana on the subject of tenant houses, at least unless Sec. 1693 be given a construction opposed thereto.

As stated in Yerrick vs. Higgins, supra, Sec. 1693 "fixes the limitations" and "limits the general definition;" if it had the effect of allowing tenant house as a part of the homestead, it would enlarge rather than "limit" the general definition. It is stated in Yerrick vs. Higgins, supra, that Sec. 1693 was taken from Sec. 322 of the Montana

Compiled Statutes of 1887. Montana C. C., Sec. 4653, provides:

"The provisions of this Code, so far as they are the same as existing statutes, must be considered as continuations thereof, and not as new enactments."

Therefore Sec. 1693, as taken from Sec. 322 Comp. Stats., would be a continuation thereof and not a new enactment. But Sec. 1670, adopted from California in 1895, would be a new enactment, and would, with the California construction thereof contemporaneously adopted, control Sec. 1693 and constitute a repeal or an amendment thereof insofar as they could not be reconciled. This argument is made because a statute almost identical with Sec. 322, Comp. Sts., from which Sec. 1693 was taken, and precisely identical with the statute construed in Gregg vs. Bostwick, supra, was given a contrary construction in Nevada.

But it appears from Vincent vs. Vineyard, supra (24 Mont. 207), that the entire homestead law of Montana was originally taken from California; therefore the construction governing Sec. 1693 would be that given to the almost identical California statute in Gregg vs. Bostwick, supra.

Statutes of the same general form and phraseology as Sec. 322 or Sec. 1693, supra, are found, not only in the California homestead law of 1851, which was construed in Gregg vs. Bostwick, supra, but also in the old Iowa homestead law and in the homestead laws of Michigan and Wisconsin. These statutes, however, differ from each other and from the Montana law in regard to the limitations, Iowa and Michigan, like Montana, having limitations both

as to value and area, California having a limitation only as to value, and Wisconsin having a limitation of area only. We will consider the decisions of these states:

IN MICHIGAN, in the case of Dyson vs. Sheley, 11 Mich. 527, as in the case of Tiernan vs. His Creditors, 62 Cal. 286, there was a double house on a lot, one side leased to tenants and the other side occupied by the owner. The rear yards were not separated by any fence. The tenant side was held subject to execution.

In the case of Gene vs. Maynard, 44 Mich. 578, the homestead claimant having erected a business block to rent, on a portion of his homestead lot, the Court held that he thereby abandoned that portion of the lot as a part of his homestead.

IN WISCONSIN, in the case of Casselman vs. Packard, 16 Wis. 114, there were on the ground claimed as homestead, the residence of the owner and also tenement buildings. The Court held that only the owner's dwelling-house and the land appurtenant thereto were exempt.

In the case of Schoffen vs. Landauer, 19 N. W. 95, the owner lived in a house on one end of his lot; he moved to a house on the other end of the lot, renting the first house, which, together with that portion of the lot pertaining thereto, was held not exempt. The Court said that the ground exempt as a homestead must be occupied solely for the purpose of a homestead; that the owner had a homestead right in the part where he lived by actual possession and dwelling, and he could not have the same right in the other end of the lot by construction and claim.

IN IOWA, in the case of Kurz vs. Brusch, 13 Ia. 371,

it is held that a tenant house cannot be exempt; this conclusion is reached both under the then existing statute and under the former statute found in 1 Ia. 435 and which is of the same general phraseology and character as Sec. 1693. The later Iowa Code expressly provided that the homestead should not embrace more than one dwelling-house

Also in the case of Kelley vs. Williams, 81 N. W. 230, a lot claimed as part of the homestead, on which was a barn which the owner had rented for many years, was held not exempt.

IN NEVADA AND IDAHO the statute is of the same general character under discussion, but those states furnish no case allowing a second dwelling-house, rented to tenants, to be part of the owner's homestead.

It has been held in certain Nevada cases, where the owner used a portion of the premises claimed by him as homestead, for the carrying on of his own business, although he did not rent any portion, that the intent of the Legislature was to exempt $5,000 worth of real estate, and that the owner, residing thereon, could use it for any purpose he chose. It is a question, however, whether even in that state, the renting of a part or all of the homestead premises would not be deemed an abandonment of the portion rented. The Court is careful to say that the claimant used the entire premises himself, and did not rent any portion thereof. It does not follow, because the owner is allowed to use the property in any way he sees fit, that he can turn it over to another man for the latter's dominion and use, wtihout thereby abandoning it. As will be seen, a similar construction was placed on the

early Texas constitutions by the early Texas cases, but this construction was subsequently repudiated as unwarranted by the wording of said constitutions. These Nevada cases are scathingly criticised, as giving an obviously false and absurd construction of the statute, in Waples on Homesteads, pp. 235 et seq., where the legal profession are advised not to give them any extra-territorial influence outside of the state where rendered.

We will now briefly call attention to the rulings of the Courts on this point in states where the homestead law differs from both Sec. 1670 and Sec. 1693.

IN KANSAS, under a provision in the Constitution that the "homestead, to the extent of one acre * * * * (without regard to value), occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempt,"—It was held in the case of Ashton vs. Ingle, 20 Kan. 670, that land, not a part of the homestead, though claimed as such, is subject to execution, and that a lot adjacent to the owner's residence, with tenant houses thereon leased to and occupied by tenants as their residences, is not part of the owner's homestead, though claimed as such. The Court says: "The words *homestead* and *residence* cannot be intended to include some other and independent family's home and residence. The owner cannot claim that such houses and lots are a part of his own home and residence, although they may adjoin the same." It is to be noted that, under the Montana or California law, a tenant may claim his residence as a homestead. But, under the rule stated in Cyc. of Law, 2d Ed. Vol. 15, p. 602, "Two separates es-

tates of homestead cannot exist in the same land at the same time." Therefore the landlord cannot claim the tenant property as part of his own homestead.

In the case of Poncelor vs. Campbell, 63 Pac. 606, tenant houses and premises adjoining the owner's residence, but separated therefrom by a fence, were held not part of the owner's homestead.

IN KENTUCKY, the homestead law as given in 4 Bush 47, provides that "So much land shall be exempt as a homestead, including the dwelling-house and appurtenances, as shall not exceed in value $1,000." In the case of Garrison vs. Penn., 66 S. W. 14, a tenant house on the same lot as the owner's residence, but separated therefrom by a fence, was held not exempt.

IN TENNESSEE, in the case of Wade vs. Wade, 9 Baxt. 612, the statute provided that a homestead "In the possession of the head of a family to the value of $1,000 shall be exempt." It was held that ground adjoining the owner's residence, rented out on shares, was not exempt, because it was not in the owner's possession.

IN TEXAS, the constitution of 1845 provided for the exemption of "The Homestead of the family, not exceeding 200 acres of land, not included, in a town or city, or any town or city lot or lots in value not to exceed $2,000." This was substantially re-enacted in the Constitution of 1869, the amount $2,000 being increased to $5,000.

In the case of Moore vs. Whitis, 30 Tex. 440, on the lot claimed as homestead were the owner's residence and also his store building. The Court held them all exempt.

This case and other cases of a similar purport were over-

ruled in Iken vs. Olenick, 44 Tex. 195, decided in 1875. The Court held that value was a mere limitation, that a homestead is confined to the residence of the owner, and does not include property used merely for business or profit. The Court said: "It is not the purpose of the Constitution to exempt a definite quantity of land in the country or lots of a designated value in the city, irrespective of the uses to which such property had been applied, so as to include property that from its nature and character or use did not form part of the homestead. The leading idea of the homestead exemption is to furnish a home and shelter to the family, limited, not to property of a specific value irrespective of its uses, but to the residence of the family."

In 1876 a new Constitution was adopted with the following homestead provision: "The homestead in a city, town or village, of lot or lots not to exceed in value $5,000 at the time of their designation as the homestead, without reference to any improvements thereon shall be exempt, provided that the same shall be used for the purpose of a home or as a place to exercise the calling or business of the head of the family; provided also, that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired." (The foregoing provision is found in 57 Tex. 429.)

In this connection the Supreme Court of Texas, in the case of Anderson vs. Sessions, 51 S. W. 874, says that by the Constitutional provision of 1876, supra, the people of Texas made for themselves a definition of homestead,

controlling on the Courts, though different from any pre-existing definitions.

Under this Constitutional provision the Courts hold that the permanent habitual renting of the homestead, or a part thereof, is an abandonment of the portion so rented, mere temporary renting being protected by the Constitution.

In the case of Evans vs. Womack, 48 Tex. 232, it was held that a piece of ground which would have been a part of the homestead if used merely for a horse-lot or domestic garden, was not part of the homestead if cultivated or rented for the support of the owner's family.

In the case of Peregov vs. Kottwitz, 54 Tex. 500, it was held that a second house, with additional appurtenances, rented to tenants, was not exempt.

In the case of Andrews vs. Hagadon, 54 Tex. 575, it was held that a tenant house on a lot adjoining the owner's residence was not part of the owner's homestead.

In the case of Keith vs. Hyndman, 57 Tex. 425, it was held that ground used for income to raise produce to sell, was not exempt as part of the owner's homestead, and that the burden is upon the defendant to establish by evidence the facts necessary to protect his claim of homestead.

In the case of Medlenka vs. Downing, 59 Tex. 32, it was held that erecting a tenant house on part of the homestead was an abandonment of that part.

In the case of Stringer vs. Swenson, 63 Tex. 7, it was held that fencing off part of the homestead lot and renting it, made it lose its homestead character.

In the case of Wynne vs. Hudson, 66 Tex. 1, it was

held that renting to tenants was not a homestead use of property, and that such renting, unless temporary, as allowed by the Constitution, was an abandonment of the portion of the homestead rented.

In the case of Milburn Wagon Co. vs. Kennedy, 13 S. W. 28, the homestead claimant built and rented a tenant house on the homestead premises, separated from his residence by a fence. The day before the attachment was issued against the leased premises, he persuaded the tenant to surrender possession, removed the fence, and resumed possession. Held, that while tenant property it was not part of the homestead; and that if the owner resumed possession merely as a pretext to protect such portion from his creditors, he could not hold it.

In the case now before the Court, the uncontradicted evidence shows that the defendants took down the intervening fence after filing the declaration; and the evidence of the plaintiff tends to show (Tr. 31, l. 4) that the alleged occupancy of the frame shed at the rear of the tenant house by the defendants was a mere pretext to protect the tenant premises from their creditors, if indeed there was any such occupancy at the time the declaration was filed, and the jury should have been allowed to consider this evidence.

In the case of Oppenheimer vs. Fritter, 14 S. W. 1051. it was held that ground and building permanently leased were not exempt; if temporarily leased, they were exempt under the permission given in the Constitution.

In the case of Blume vs. Rogers, 15 S. W. 115, tenant premises were held not exempt.

So in the following cases:

Achilles vs. Willis, 16 S. W. 746.

Blackburn vs. Knight, 16 S. W. 1075.

Allen vs. Whitacre, 18 S. W. 160.

Pfeiffer vs. McNatt, 12 S. W. 821.

Hill vs. Hill's Estate, 19 S. W. 1016.

Ford vs. Fosgard, 25 S. W. 445.

Charles vs. Chaney, 26 S. W. 169

Hendrick vs. Hendrick, 34 S. W. 804.

Waggener vs. Haskell, 35 S. W. 711.

Jones vs. Lee, 41 S. W. 195.

Heatherly vs. Little, 52 S. W. 980.

Wursbach vs. Menger, 65 S. W. 679.

IN ALABAMA, in the case of Kaster vs. McWilliams, 41 Ala. 302, held, that the homestead, when rented, is not exempt; that it is absurd to say that the land is in the use of the family because the rent goes to maintain it.

In the case of Garland vs. Bostwick, 23 So. 698, held, that a tenant house was not part of the homestead, and that whether a building is homestead is determined by the character of the building and the use of it. In the case now before the Court, the character of the building shows that it was intended as the home of an independent family, and not as a mere annex to the adjoining residence of the owner.

IN FLORIDA, in the case of Greeley vs. Scott, 2 Woods 657 (Fed. Case No. 5746), it was held that tenant houses

are not part of a rural homestead, under the Constitutional provision allowing a homestead to the extent of 160 acres and the improvements on the real estate. Nor would a sawmill be a part of it.

In the case of Smith vs. Guckenheimer, 27 So. 900, the Court decided that a business building, used in part for the owner's residence, and in part rented to tenants, should be divided between the owner and his creditors. The Court said that a separate tenant building and the ground used in connection therewith would not be exempt.

IN MISSISSIPPI, in 67 Miss. 139, it was held that tenant premises were not part of the owner's homestead; so in 6 So. 736 and 7 So. 430. In these cases the tenant premises claimed as part of the homestead were not contiguous to the owner's residence, the law allowing non-contiguous lots to constitute one homestead.

IN SOUTH CAROLINA, in the case of Harrell vs. Crea, 16 S. E. 42, it was held, under the Constitution exempting "family homestead consisting of the dwelling-house, outbuildings and lands appurtenant," that land rented by the owner and not used in connection with his family homestead was not exempt. The Court held that the land in question was not appurtenant, but "on the contrary" rented out to another person.

IN NEW HAMPSHIRE, in the case of Hoit vs. Webb, 36 N. H. 158, held, that a tenant house is not exempt, and that value is a mere limitation.

The principle urged is asserted as a rule also in Waples

on Homesteads, pp. 146, 186, 188, and in Thompson on Homesteads, Sec. 130.

In the Encyclopedia of Law, 2d Ed., Vol. 15, page 586, it is stated: "A tract adjoining the premises occupied as a homestead, but leased to others and used only as a source of revenue, is held in most states to form no part of the homestead and not to be exempt."

IN ILLINOIS, where the statute expressly allows an exemption of $1,000 of real property, providing only that the debtor resides thereon, it is held that he can use such portion of his exempt real estate as he does not need for residence purposes, for any purpose he wishes, including rental to tenants. There the statute makes the exemption the primary thing, and the homestead and residence feature merely incidental.

CONCLUSION.

Illinois appears to be the only state where it is expressly held that a homestead may be created so as to include property rented to tenants. Any theory that this can be done in Montana must needs be based on decisions founded on statutes or Constitutional provisions allowing temporary renting of the homestead or part thereof, as in Texas and Oklahoma; or on cases where, instead of there being a separate tenant building, there is but one building, which is occupied by the claimant as his residence, a part of it being rented, in which case the Courts are inclined to be more liberal as shown under the following head; or on occasional dicta to the effect that a homesteader may use

his homestead in any way he sees fit, provided he has his residence thereon, but these dicta almost invariably refer to the use of the homestead premises by the claimant for carrying on his trade or business and not for rental, or to cases where there is only one building, in which the claimant resides, and a part of which he uses either for his own business or for rental to tenants. The exceptional ruling in Lubbock vs. McMann, 82 Cal. 226, supra, may also be noted, where, after the establishment of the homestead in the premises, a tenement building subsequently erected thereon and rented was held exempt, on the ground that the homestead, once established, could not be abandoned, save by an instrument in writing; but in the case before the Court the tenant property was such when the homestead was sought to be established.

WHERE THERE IS A SINGLE BUILDING IN WHICH THE OWNER RESIDES, CLAIMING THE ENTIRE BUILDING AS HOMESTEAD, BUT A PART OF THE BUILDING IS DEVOTED TO NON-HOMESTEAD USES, AS TO THE OWNER'S BUSINESS. OR FOR RENTAL TO TENANTS FOR RESIDENCE OR BUSINESS, OR IS DEVOTED TO HOTEL PURPOSES, THEN, UNLESS IT IS PRACTICABLE TO DIVIDE THE BUILDING, ITS CHARACTER AS HOMESTEAD OR NON-HOMESTEAD IS DETERMINED BY ITS PRINCIPAL USE.

Here the Courts are in a dilemna which did not exist when the premises claimed as homestead but rented to

tenants consisted of a separate building and separate premises, or one-half of a double house. In that case a division could easily be made between the bona fide homestead premises and the tenant premises. But a hotel or business block, or any single building, is usually considered not divisible, and the Courts therefore feel compelled either to allow the whole building to be exempt as homestead, or none of it; and the test usually adopted to determine which it shall be, is that of principal use. Yet the Courts are much more liberal toward the homestead claimant under this state of facts than where there are separate buildings, because they are undisposed to take away the only home a man has, even though his use of it is in a large degree an evasion of the statute. For this reason Courts have not infrequently asserted that a homestead claimant may use the building in which he resides for any purpose he sees fit; and to bolster up that position, have put a strained construction on the homestead statutes to the effect that the homestead claimant may use the entire premises claimed as homestead for any purpose so long as he lives there. But it is to be noted that the same Courts which have held a single building exempt when resided in by the claimant, though principally used for non-homestead purposes, have uniformly held, where the case has been presented of two buildings, one resided in by the claimant and the other rented to tenants, that such tenant building with the ground appurtenant thereto was not exempt.

The Supreme Court of Montana has not passed upon this question.

The Supreme Court of California, in dealing with such a state of facts has adopted the doctrine of principal use in its decisions with practical uniformity. The following cases from that state may be cited on this point:

In the case of Ackley vs. Chamberlain, 16 Cal. 181, where a farm-house located on a mountain road was enlarged so that it might be, and was used as an inn for the entertainment of passing travelers, it was held by Mr. Justice Field that its principal use was as a farmhouse, and it was therefore held exempt. This case was decided in 1860 under the statute set forth in Gregg vs. Bostwick, almost identical with Montana C. C., Sec. 1693.

Other cases in California decided on the same principal are:

In re Noah, 73 Cal. 590, where the Court held that a business block devoted principally to business was not susceptible of being made a homestead by the owner taking up his residence therein and filing a declaration.

In re McDowell, 35 Pacific 1031, where the owner of a hotel residing therein to carry on the business was held not entitled to claim the hotel as his homestead because principally used as a hotel.

In re Ogburn's estate, 38 Pac. 498, where a subsidiary use of the owner's residence for the owner's business was held not to destroy its homestead character.

Beronimo vs. Lumber Co. 61 Pac. 958, where a building erected for the purpose of carrying on a general merchandise store and hotel, the owner residing therein for the purpose of carrying on these enterprises, was held not exempt as his homestead.

The only case which does not fully harmonize with the foregoing is that of Heathman vs. Holmes, 94 Cal. 291, where the owner of a residence, reserving a small part of it for the residence of himself and family, rented the greater part for lodging-house purposes, and the entire building was held exempt. The question of principal use is not mentioned. The case could have been decided in the way it was on the theory laid down in Lubbock vs. McMann, 82 Cal. 226, that, the homestead character having once attached to the property, any use to which the owner might choose to put it would not constitute an abandonment of it, or destroy his homestead right in any part of it.

IN MICHIGAN, where the statute is more nearly like Sec. 1693 than that of any other state except the old Iowa statute on account of having the limitations both of value and area, the Court, having decided in Dyson vs. Sheley, 11 Mich. 527, that where a double house, one side of which was rented was claimed as a homestead, the tenant side was subject to execution, held in Orr vs. Shraft, 22 Mich. 260, where a two-story building was used, the upper story for the owner's residence and the lower story for the owner's business, that it was like the case of a lawyer having his law office in his house, and therefore, the principal use being the home use, the entire building was exempt as a homestead.

Subsequently, in the case of King vs. Welborn, 47 N. W. 106, where the owner of a two-story hotel resided therein for the purpose of conducting it, the doctrine of principal use was not followed, but the whole building was held

exempt as a homestead, the Court saying that to hold otherwise would render the statute nugatory as to those engaged in the business of hotel keeping; that the benefits of the statute are to be secured to all owners of land which they occupy with their families and who have no other home; that there is no apparent intent anywhere to exclude the families of hotel keepers from the benefit of the act.

IN WISCONSIN, where the phraseology of the statute is about the same as Sec. 1693, though there is no limitation of value, the same Court and the same Judge who delivered the opinion in Casselman vs. Packard, 16 Wis. 114, that a separate tenant house was not exempt, held, in Phelps vs. Rooney, 9 Wis. 70, that a large and valuable business block in which the owner resided, the remainder of the block being rented for business purposes, was all exempt.

In the case of Harriman vs. Insurance Co. 5 N. W. 12, where a large building, built and always used by the owner or his lessees for a hotel, was claimed as a homestead, the Court follows Phelps vs. Rooney on the principle of *stare decisis,* but says a better rule would have been that the property is not exempt unless it is principally used as the residence of the owner. The same Court thereafter decided in the case of Schoffen vs. Landauer, 19 N. W. 95, that a separate tenant house was not exempt.

In the case of Binzel vs. Grogan, 29 N. W. 895, the Court held that the homestead law was enacted in pursuance of a Constitutional provision requiring the Legislature to recognize by law the privilege of the debtor to enjoy the necessary comforts of life, by exempting a reas-

onable amount of property, and that a home was one of the necessary comforts of life in the enjoyment of which the Legislature was required to protect the debtor, and that the homestead exemption was enacted pursuant to this mandate of the Constitution. The Court therefore held that in view of the Constitution the Legislature must be deemed to have intended to exempt to every debtor the home which he owns and occupies, with the specified quantity of land appurtenant thereto, without regard to the uses to which he puts such land or the business he pursues upon it. Held, accordingly, that a hotel in the country, with the land connected therewith, was all exempt.

It is to be noted in this connection that the Supreme Court of Montana, in the case of Yerrick vs. Higgins, 22 Mont. 502, says that in Montana the homestead is a purely statutory right.

In the case of In re Lammer, 7 Biss. 269 (Fed. Cas. 8031), and the case of In re Wright, 3 Biss. 359 (Fed. Cas. 18067) (Wis), it was held that a building that by character and construction was a business block and not designed for residence, could not be the owner's homestead, although he resided therein.

IN MINNESOTA, under a statute very similar to Sec. 1693, though without any limitation of value, in the case of Tillotson vs. Millard, 7 Minn. 513, the Court held that the homestead was restricted to the home, and that the object of the statute was to provide a home and not to give the use of a certain quantity of land and dwelling-house for any other purpose, and that to call premises

homestead when the debtor resides elsewhere or rents would be a misnomer.

Yet, in the case of Kelly vs. Baker, 10 Minn. 154, the homestead was claimed in a business block in which the owner resided, but the greater part of which was rented out for various purposes. The creditor attempted to sell under execution the portion of the building not used by the family for residence, but the Court held the entire block exempt. The Court remarks that the homestead property can be put to any use the owner desires, there being no restriction in the statute. This case is followed, in cases involving the homestead character of business blocks, in Winland vs. Holcomb, 3 N. W. 341, and Jacoby vs. Distilling Co. 43 N. W. 52.

IN IOWA, the Court which held in Kurz vs. Brusch, 13 Ia. 371, that separate tenant houses are not exempt, held in Rhodes vs. McCormick, 4 Ia. 368, that a business block in which the owner resided on the 2d and 3d floors, but the first floor and the basement of which were rented for business, should be divided and the floors rented for business sold under execution. This case was followed in Mayfield vs. Maasdom, 13 N. W. 652, and in the case of Johnson vs. Moser, 24 N. W. 32, under similar states of fact.

IN KANSAS, the Court, having decided in Ashton vs. Ingle, 20 Kan. 670, that tenant houses were not part of a homestead, held in the case of Hogan vs. Manners, 23 Kan. 551, that where the owner used a room or two of his residence for his business, it was all exempt under the doctrine of principal use.

In the case of Rush vs. Gordon, 16 Pac. 700, where a brick block was used entirely for the owner's residence and business, the owner residing in the 2d and 3d stories, the first story being occupied by his store, the entire building was held exempt.

In the case of Bebb vs. Crowe, 18 Pac. 223, a building, the second story of which was used for the owner's residence, and the first story used in part for the owner's business and in part rented for business, the Court held that the entire building was exempt. The Court stated, however, that if a building should practically become a business house rather than a home, it would not be exempt,—thus recognizing the doctrine of principal use.

IN ALABAMA, in the case of Garrett vs. Jones, 10 So. 702, the owner of a business block resided therein, but the principal use of the building was for business, and it was therefore held not exempt. (The owner was a single man, but in Alabama a single man may have a homestead.)

And in Turner vs. Turner, 18 So. 210, a hotel was held not exempt because the principal use governed. The Court held that, while the rental of the homestead may contribute to the support of the family, yet that is not the sort of use intended by the statute, which contemplates the use of a thing and not of an income derived from it, and the Court declared this ruling to be in accord with the general run of authorities elsewhere.

IN FLORIDA, in the case of Smith vs. Guckenheimer, 27 So. 900, it was held that a business block occupied by the owner for residence, but used mainly for his business and the business of tenants, should be divided and the

part not used for residence sold under execution. The Court reviews the cases on the homestead status of such buildings.

IN TENNESSEE, in the case of Flannagan vs. Stifel, 3 Tenn. Ch. 465, the owner occupied the second story of his house as his residence and rented the first story. Held, all exempt.

IN TEXAS, in the case of Hargadine vs. Whitfield, 9 S. W. 475, the front part of a store was rented and the rear part was used by the owner as a warehouse, the two parts being separated by a frame partition. Held, that the portion used by the owner alone constituted his business homestead, and that the building should be divided and the rented portion sold under execution.

In the case of Pfeiffer vs. McNatt, 12 S. W. 821, where the owner of two adjoining stores which were connected by two arches, made some business use of both, but partly rented the first, and conducted his own business principally in the second, the second alone was held exempt as his business homestead. The Court said that a man could not expect to protect a block of business houses by doing conveyancing in one corner of them.

In Freeman on Execution, Third Edition, Sec. 244, it is said on page 1324, "Generally the Courts have considered all the uses and purposes for which the buildings have been constructed and used. If upon the whole it appears that the chief use or purpose of the building was that of homestead, they have not condemned the whole or any part to forced sale because some of the rooms or parts have been rented out or used for business pur-

poses. But if, on the other hand, the primary use of the building is for business purposes, they have held it subject to execution though occupied by the debtor and his family as a home;" and on page 1327, "The use of a residence for hotel purposes will not forfeit the debtor's claim to hold it as his exempt homestead; and the use of a hotel for residence purposes will not enable the owner to maintain a claim for its exemption as homestead;" and on page 1329: "If homestead laws are to be interpretated with reference to the well-known purpose of their enactment (to secure the debtor's home), they must be confined in their operation to that portion of the premises claimed which constitute the claimant's home, and so not to embrace building separated from the family residence and rented to tenants. * * * * If there are several distinct tenements, whether united into one structure or not, one tenement may be used as the home of the debtor, while the others may be used for rental or business purposes. In such case the former is clearly exempt because it is the homestead in fact, and the latter as certainly not exempt, for they are no more a part of the homestead in fact than if they were situated in remote parts of the town."

IN MASSACHUSETTS, in the case of Mercier vs. Chace, 11 Allen, 194, it is held that merely renting rooms in the homestead, the principal use being the as home of the owner, does not make any part of the building subject to execution.

And on the same principle of principal use, in Lazell vs. Lazell, 8 Allen 576, a country hotel was held exempt.

And in the case of Pratt vs. Pratt, 37 N. E. 435, where there was a tenant in a part of a single house built for one family and also occupied as the residence of the owner, the entire building was likewise held exempt.

CONCLUSIONS.

1. While the Courts are strict in denying to the homestead claimant the right to include in his homestead a separate tenant house adjoining his residence, yet they are liberal in the use they allow the claimant to make of his house when he has only one house; some courts holding that if he uses it principally for his home that is sufficient to protect it; other courts going to the extent of holding that, though his homestead use of it be secondary, yet it must be protected because otherwise he would be entirely deprived of a home; still other Courts holding that the building must be divided.

2. Leaving out of account a division of such a building (which has usually been deemed impracticable, and which has never been done in California, whence Montana derived her homestead statutes), we submit that the only method of treating such a building, which is just both to the debtor and his creditor, is to apply the test of its principal use to determine its homestead character, as is done in California.

3. In the case before the Court we have, not one, but two dwelling-houses, one entirely occupied by the claimant, the other rented to a tenant, but used by the claimant (so he claims) to some extent. Assuming that the

second building cannot be divided, it must go all to the claimant or all to his creditor. As the claimant has another house, he will not be entirely deprived of a home by losing this, and he is therefore not entitled to the extreme liberality sometimes shown when there is only a single house, in holding it all homestead though principally used for non-homestead purposes. Yet he makes some homestead use of it, and therefore has a claim on it; so has the creditor, because it is in part used for non-homestead purposes. The principal use of this second building and its appurtenant ground, we submit, is the proper test in determining its homestead character.

IF A HOMESTEAD DECLARATION IS FILED ON A LOT ON WHICH THERE ARE TWO DWELLING HOUSES, IN ONE OF WHICH THE CLAIMANT RESIDES, AND THE PRINCIPAL USE OF THE OTHER HOUSE IS AS A TENEMENT, THEN THE LATTER HOUSE WITH THE LAND APPURTENANT THERETO IS NOT PROPERLY INCLUDED IN THE HOMESTEAD DECLARATION AND DOES NOT BECOME A PART OF THE HOMESTEAD. AND IT DOES NOT MAKE SUCH ADDITIONAL HOUSE A PART OF THE CLAIMANT'S HOMESTEAD, BECAUSE MEMBERS OF HIS FAMILY MAY OCCASIONALLY, OR EVEN HABITUALLY, USE ONE OF ITS ROOMS AS A SLEEPING APARTMENT.

PREMISES CONSISTING OF SUCH A TENEMENT HOUSE, WITH ITS OWN REAR YARD ENCLOSED

BY FENCE, AND ITS OWN SEPARATE OUTBUILDINGS THEREON, FORM NO PART OF THE HOMESTEAD OF THE OWNER OF THE LOT, WHO HAS ON THE SAME LOT A SEPARATE DWELLING-HOUSE IN WHICH HE RESIDES, HAVING ITS OWN SEPARATE REAR YARD WITH THE CUSTOMARY OUTBUILDINGS THEREON APPURTENANT TO SAID DWELLING, EVEN THOUGH SAID CLAIMANT MAKE SOME USE OF THE TENEMENT HOUSE OR ITS YARD OR BOTH, AT LEAST IF HIS USE OF THE TENEMENT HOUSE AND ITS YARD BE NOT SO EXTENSIVE AND EXCLUSIVE AS TO CONSTITUTE THE PREDOMINANT AND PRINCIPAL USE THEREOF. BUT IF THE PRINCIPAL USE OF SUCH TENEMENT HOUSE AND ITS YARD AND OUTBUILDINGS IS FOR TENEMENT PURPOSES, OR IF IT IS THE OWNER'S HABIT AND PRACTICE TO ALLOW THEM TO BE USED PRINCIPALLY BY A TENANT WHEN ONE CAN BE SECURED, THEN SUCH PREMISES ARE SUBJECT TO EXECUTION AND FORM NO PART OF THE CLAIMANT'S HOMESTEAD.

There is only one case in California, we believe, that directly bears upon this point, as distinguished from the two points last discussed.

In the case of In re Allen, first decided in 16 Pac. 319, said decision being reversed in 78 Cal. 293, there were two adjoining lots, both claimed as the owner's homestead.

On one of these lots the owner resided with his family. The rear portion of the adjoining lot was fenced off and

contained the owner's chicken-house and outhouses. These two portions of the ground were admitted to be homestead. But the front 89 feet of said adjoining lot had on it a building in which were a wagon-shop rented to a tenant and a blacksmith shop used by the homestead claimant, the portion of the said 89 feet not occupied by the building being used in connection with these occupations. In the unfinished second story of said building, part of the homestead claimant's family slept. The Court in its first decision held that this 89 feet should be considered part of the homestead unless the family use thereof was merely incidental and the principal use of it was for business or renting. In the second decision the Court, ascertaining that it was established that the principal use of the 89 feet was for the business occupations pursued thereon, and not for family purposes, decided that said 89 feet was no part of the homestead.

IN MICHIGAN, in the case of Dyson vs. Sheley, 11 Mich. 527, where there was a double house on a lot, intended for two families, one side accupied by the owner as a residence and the other side leased to tenants, and where the Court held the tenant side of the premises to be not part of the homestead, but subject to execution, the facts were: The rear yards of the two houses were not separated by a fence, as they were according to the testimony in the case now before the Court; on the tenant side of the premises was a double privy used by both families. Also, as in the case now before the Court, the tenant side had been leased for several years.

This subsidiary use of the tenant premises by the home-

stead claimant was held not to operate to make it, or any portion of it, part of his homestead. The Court said: "The rights of the owner in the tenant side, whatever they are, do not predominate over those of the tenant, and do not show that the tenant had a mere easement." Here the Court decided that, the principal use of the tenant being for tenement purposes, said premises were subject to execution.

IN WISCONSIN, in the case of In re Lammer, 7 Biss. 269 (Fed. Cas. 8031), the owner's residence was on the rear of his lot; he built a business block on the front of the lot containing several stores. He partitioned off one of these stores and moved in with his wife, leaving part of his family in the old house. The Court held that he could not hold the block as his homestead.

IN IOWA, in the case of Mayfield vs. Maasdom, 13 N. W. 652, there was a two-story brick building, the second story of which was occupied by the owner as his residence; and the first story was used for business—except the stairway leading to the second story. In Iowa, as heretofore shown, it is the policy of the Courts, where certain stories of a building are used for the owner's residence, and other stories for business, to allow the stories devoted to business to be sold on execution as not part of the homestead. That policy was followed in this case. But in the first story were two small rooms separated from the store by partitions and used by the family to some extent for storage. The Court held that these rooms were essentially part of the storeroom and not exempt. Here the Court applied the doctrine of principal use to a portion of the

premises claimed as homestead and used therefor to some extent, but principally devoted to non-homestead uses. The storeroom being principally devoted to business, though a part of it was used for family purposes, was all held subject to execution.

IN KANSAS, in the case of Ashton vs. Ingle, 20 Kan. 670, on a piece of ground claimed as homestead were the owner's residence and appurtenant outbuildings on one end of the lot; on the other end, with no fences intervening, were two tenant houses. A clothesline was stretched from one of the tenant houses across the tenant ground on to the owner's part of the ground, and used jointly by the owner and his tenants. A walk also extended across the tenant ground, used by the tenants, and occasionally used by the homestead claimant. A cistern on the tenant ground was used by the tenants, and occasionally by the homestead claimant when his own cistern gave out. The Court held that these uses of the tenant part by the owner did not make such premises or any part thereof part of his homestead.

IN TEXAS, in the case of Peregov vs. Kottwitz, 54 Tex. 500, a tenant house and grounds with separate appurtenances was held not exempt, though the owner claimed to use the cistern thereon, and to use the ground for his garden.

In the case of Nix vs. Mayer, 2 S. W. 819, it was held that land not used for homestead purposes, except to supply the owner's family with water from a spring, is none of it homestead.

In the case of Blum vs. Rogers, 15 S. W. 115, the owner

of ten tenement houses, all claimed as belonging to his homestead, reserved the ground around the houses and used it for garden and other purposes. Held, that neither the houses nor the ground connected with them were homestead; that though the ground was used by the owner in connection with his own home, yet the principal use governed which was for tenement purposes.

In the case of Achilles vs. Willis, 16 S. W. 746, the lot adjoining the owner's residence was partly rented and partly used for stabling the owner's cow and for purposes of family washing. Held, that the lot was not so connected in use with the family homestead as to constitute part of it.

In the case of Allen vs. Whitacre, 18 S. W. 160, the Court held that pasturing a cow on land rented to tenants, not being the principal use of the land, does not make it part of the homestead.

In the case of Pfeiffer vs. McNatt, 12 S. W. 821, the owner of two adjoining business buildings, which were connected by arches, claimed them both as his business homestead, under the Constitutional provision protecting a man's place of business as part of his homestead. The owner, as Mayor, held Court sometimes in the rear part of the East building, sometimes in the rear part of the west building, according to the weather, there being a stove in the west building. The front of the east building was occupied by the postoffice without rent, and he was deputy postmaster. The front of the west building was rented to his brother for a store, and the owner of the buildings was clerk in the store. Held, that his claim to

the west building (which was in the main rented for a store), should not be upheld merely because he had a desk in the back end of it and did conveyancing and notary work there. The Court held that it would be unreasonable to protect his claim to both buildings.

In the case of Ford vs. Fosgard, 25 S. W. 445, the owner's residence was on the rear of the lots claimed by him as his homestead. On the front of the lots was a one-story brick house, usually rented to a shoemaker, the owner also using it for storage. Held, not exempt. Adjoining this one-story building was a two-story brick house, the second story of which was used by the owner's family and servants for sleeping rooms. The rear room of the first story was rented to two men lodgers and also used by the owner for storage, and he also kept his workbench there. The two front rooms on this floor were rented respectively for a barber shop and fruit stand, the owner keeping a key to each, not allowing his tenants exclusive use, but keeping a writing desk in the barber shop, where he did his writing, and storing articles in the fruit stand. The cellar under the two-story building was used as the family cellar. Held, that the building should be divided, and the fruit stand and barber shop sold under execution. Here the doctrine of principal use was applied to the shoe-shop, barber-shop and fruit-stand.

In the case of Hendrick vs| Hendrick, 34 S. W. 804, in addition to the owner's residence there were several tenements, the whole property being claimed as homestead. There was a common well. The owner used the tenant lots for pasture. The tenants had no exclusive right ex-

cept to the houses they lived in, and the tenant lots were used in common by the tenants and the owner. The tenant houses and the tenant lots were held no part of the homestead, and subject to execution.

In the case of Jones vs. Lee, 41 S. W. 195, there was, adjacent to the owner's residence an enclosed lot with a house thereon. The owner's cook had occupied the house, and the owner's calves fed on the lot, but there was evidence that for a year prior to the levy the house and lot were rented to a tenant. Finding of abandonment not disturbed.

In the case of Henry vs. Nat'l Bank, 44 S. W. 568, an instruction was approved to the effect that a subsidiary use such as occasionally sleeping on the premises by a part of the family was not sufficient to make property otherwise used and occupied part of the homestead.

In the case of Heatherly vs. Little, 52 S. W. 980, it was held that the principal use governs, and that casual or temporary use by the owner does not. And where adjacent land was bought and a house erected thereon for the purpose of renting the same, held, that a subsidiary use for homestead purposes does not make it part of the homestead.

In the case of Phillips vs. Loan Agency, 63 S. W. 1080, it was held that the owner of a vacant lot adjacent to his residence could not hold it as a part of his homestead, though he used it for the subsidiary purposes of cleaning carpets, piling wood and grazing his horse and cow. It appeared also that he had represented that it was not part of his homestead.

In the case of Wurzbach vs. Menger, 65 N. W. 679, the homestead claimant owned two lots adjacent to his residence. There were tenant houses on each, rented. The owner used the tenant lots for drying clothes, and his children and chickens had free access to the lots. Held, that the tenant premises were no longer part of the owner's homestead, and that the fact of their having been rented for ten years, and being necessary for the support of the owner's family, was conclusive evidence of permanent abandonment.

There are cases in Texas apparently in conflict with the foregoing, because they hold that a tenant house and grounds of which the homestead claimant makes some subsidiary homestead use, is part of his homestead. There are two classes of such cases:

1. The renting is shown to be temporary as a matter of fact, and therefore the tenant premises are protected as a part of the homestead under the express provision of the Constitution, even though the homestead claimant make no use of the tenant premises at all.

2. Where the claimant continues to make some use of the tenant premises, it is held evidence that he intends the renting to be merely temporary. The burden is placed on the creditor to prove that the renting is permanent, which he may be unable to do, though it may be a fact. Permanent renting constitutes an abandonment.

In the present case our claim is, not that the tenant premises were abandoned, but that they never became part of the homestead. And the burden is on the claimant to show that said premises were of such a character, and so

used, that they became part of the homestead when the declaration was filed. We show that they were rented for years, both before and after and at the time of the filing of the declaration; this being so they could not become a part of the homestead, unless the principal use of the tenant house and premises was by the homestead claimant for homestead purposes. To show that the renting was intended to be temporary would not avail the claimant in this state, because no distinction is made by statute between permanent and temporary renting.

Most of these Texas cases and some others that have been cited turn on the question of abandonment. In Montana and California a homestead once established cannot be abandoned except by a declaration in writing duly acknowledged and filed. But these cases are nevertheless in point, because the same facts which would constitute an abandonment in Texas would, either in Montana or in California, if existing at the time the homestead is attempted to be created, prevent its creation, or prevent the inclusion therein of that portion of the premises to which the facts apply. Thus, rental to tenants, if existing when the homestead right is sought to be initiated, excludes the rented portion, though claimed, from the homestead.

CONCLUSION.

In conclusion we would say:

(1) That in all the states which have statutes precisely or substantially the same as Sec. 1670 or Sec. 1693 of the Montana Civil Code, it is uniformly held, where the ques-

tion has been raised, that a tenant house, separate and apart from the owner's residence, though upon the same or an adjoining lot, is no part of the owner's homestead, though claimed as such, and is subject to execution.

(2) That in the other states, except in Illinois (where the statute makes the exemption the primary object and the residence thereon merely incidental), and in Texas (where the Constitution allows temporary renting), the decisions are so nearly uniform in holding the same way that the rare exceptions are not worthy of consideration.

(3) That where the rented part, instead of being a separate building, is in the single building occupied by the claimant as a residence, the Court decides as follows:

(a) Where it is a double house, they hold the building divisible.

(b) Where it is not a double house, the building is nevertheless divided in Iowa, Florida and Texas; but other Courts hold division impracticable.

(c) Where the building is held not divisible, the Courts usually decide that the entire building is, or is not, the claimant's homestead according as the building is found to be used principally as the residence and home of the claimant, or, is used principally for rental or business, giving to the claimant the benefit of the doubt where the uses seem to be about evenly balanced.

(d) Quite a number of decisions reject the doctrine of principal use under such a state of facts, and protect the entire building as the homestead of the claimant, though his use of it as a home is subordinate to other uses, on the principle that to hold otherwise would be to take

away the entire building from the claimant, thus depriving him of the only home he has.

But the Courts that so hold, uniformly hold, where the question has arisen, that a separate building, rented to tenants, is not part of the homestead.

4. Where there is a separate tenement, and some subordinate use is made by the homestead claimant of the tenement house and grounds, these are held, nevertheless, to form no part of his homestead.

In bringing to a close this brief, which has been long because we have deemed the homestead question to be essentially a matter of the construction of homestead statutes, we have one observation to make.

We have presented the effort of a single family to hold exempt as its family homestead three potential homesteads. There is, first, the federal homestead of Mr. McCaffery; second, the house where Mrs. McCaffery resided when she filed the declaration, with its appurtenant ground; third, the tenement house adjoining, with its appurtenant ground.

To allow the defendants to retain these three distinct properties, secure from their creditors, as homestead, would be a perversion of the spirit and intent of any and all homestead laws. It is the settled public policy that every debtor shall be allowed to select a home and hold it as a refuge for himself and family, free from his debts. If he fails to make such a selection, it is his own fault. If he does make such selection he should be limited to that; a family needs only one home; a man who owes more than he can pay is not entitled to the luxury of several resi-

dences. If he has several residences, or potential residences, and chooses one, so that it is legally exempt as his homestead, he should be held to that choice until it is definitely relinquished, so that the creditor may know where he stands. As is said in Wright vs. Dunning, 46 Ill. 271, and Tourville vs. Pierson, 39 Ill. 446, he cannot have two homesteads, either of which at his election will be exempt. We therefore submit that the first selection made by this family, the federal homestead, which was never relinquished or forfeited, was, at the date of plaintiff's deficiency judgment, the family homestead, and the only one they had or to which they were entitled.

We believe that, by reason of the errors shown, in the admission and rejection of evidence, and the refusal of instructions, the judgment should be reversed.

But for two reasons we also think it proper to suggest that the cause should be remanded to the lower Court with directions to enter judgment in favor of the plaintiff:

First. Because the record of the unstamped homestead declaration was void and therefore no state homestead was created.

Second. Because neither said declaration nor the record thereof could be made available as evidence on a new trial by post-stamping said instrument, for the reason that Sec. 13 of the War Revenue Act provides for post-stamping only certain instruments specified therein, not including such a certificate as the one in question; and said section as amended in the Act of March 2nd, 1901, provides for poststamping only instruments mentioned in

said amendatory act, from which the provision in regard to such certificates is entirely omitted.

And said instrument, if post-stamped, and its record, would not be available as evidence in a new trial, on account of the final provision of said Sec. 13, that "No right acquired in good faith before the stamping of such instrument, or copy thereof, as herein provided, if such record is required by law, shall in any manner be affected by such stamping as aforesaid." The plaintiff's intervening rights would not be affected by such post-stamping.

For the foregoing reasons the plaintiff in error respectfully submits that the judgment should be reversed, and the cause remanded to the lower Court with directions to enter judgment in her favor.

Respectfully submitted,

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